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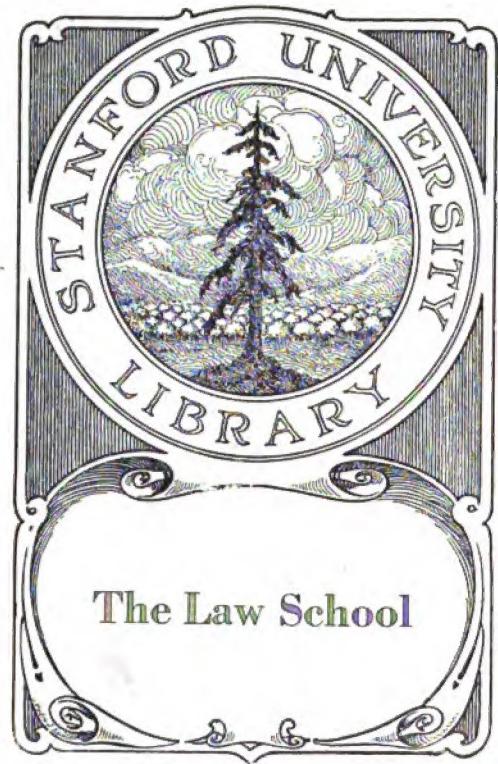
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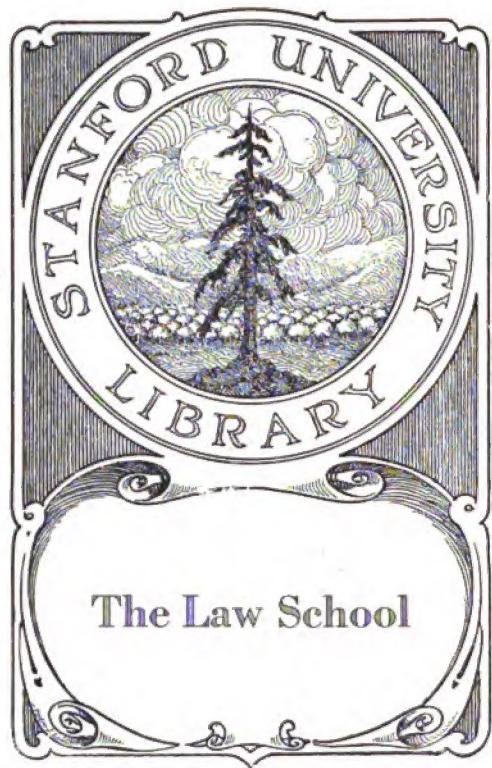
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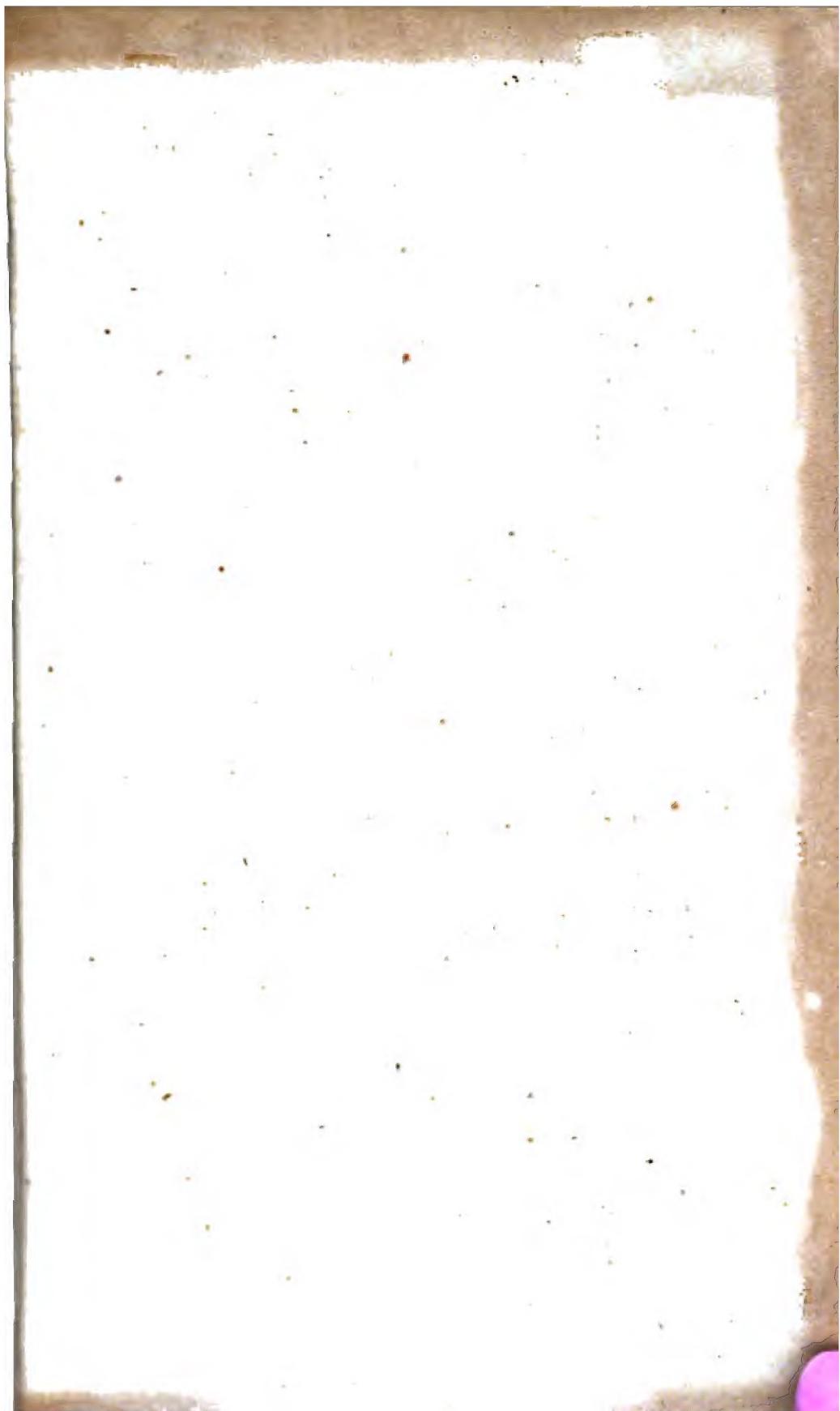
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The Law School





REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT OF CHANCERY

OF THE

STATE OF MISSISSIPPI.

By W. C. SMEDES AND T. A. MARSHALL,
OF VICKSBURG,
REPORTERS TO THE COURT.

VOL. I.

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**CHANCELLOR
OF THE
STATE OF MISSISSIPPI
DURING THE TIME OF THESE REPORTS.**

Hon. ROBERT H. BUCKNER.



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THIS volume, of the Reports of the Decisions of the Superior Court of Chancery of the State of Mississippi, is offered to the profession as a work entirely of individual enterprise. It is unsupported by the patronage of the State; the legislature, at its last session, having abolished the office of reporter of that court, so far as his connection with the State extended.

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T A B L E
OF THE CASES REPORTED.

PAGE.		PAGE.	
Adams (Rowan & Harris v.)	45	Fisher v. Grimes	107
Andrews (Pope v.)	135	Fletcher v. Rapp	374
Bacon v. Conn	348	—— v. Wilson	376
Baine (Hines v.)	530	Foote v. Garland	95
Barker (Stacy v.)	112	Freeman v. Finnall	623
Barrow v. Barrow	101	Garland (Foote v.)	95
Beasley (Crisman v.)	561	Gaskins (Miller v.)	524
Bingaman v. Hyatt	437	Gibson's heirs v. Niblett	278
Bodley (Jenkins v.)	338	Glasscock (Martin, Pleasants, & Co. v.)	17
Boisgerard v. Wall	404	Gordon v. Watkins	37
Bullard (Craft v.)	366	Grimes (Fisher v.)	107
Bush (Steger v.)	172	Guise v. Middleton	89
Cannon v. Kinney	555	Gwin v. Harris	528
Chewning v. Nichols	192	—— v. Stone	124
Claiborne (Williams v.)	355	Haley (Warren v.)	647
Commercial Bank of Rodney (Montgomery v.)	632	Hamberlin v. Terry	589
Commissioners of Sinking Fund v. Patrick	110	Hamer v. Johnston	563
Conn (Bacon v.)	348	Harper (Pickens v.)	539
Cord (Vannerson v.)	345	Harris (Gwin v.)	598
Cotton v. Parker	195, 191	Herring v. Winans	466
Courtney (Planters Bank v.)	40	Hines v. Baine	530
Cowan (Payne v.)	26	Hope v. Evans	195
Craft v. Bullard	366	Hyatt (Bingaman v.)	437
Crisman v. Beasley	561	Jenkins v. Bodley	338
Davis v. Roberts	543	Johnston (Hamer v.)	563
—— v. Yerby	508	Kane (Tooley v.)	518
Denton (Patterson v.)	592	Kinney (Cannon v.)	566
Dick v. Truly	557	Land v. Land	158
Embry (Robins v.)	207	Latham v. Morgan & Fitz	611
Evans (Hope v.)	195	Ledyard, Hatter, & Co. (Mc- Intyre v.)	91
Everett v. Winn	67	Lowry & Puckett v. McDonald & Rogers	620
Finnall (Freeman v.)	623		

TABLE OF THE CASES REPORTED.

	PAGE.		PAGE.
Marshall <i>v.</i> Morton	563	Rapp (Fletcher <i>v.</i>)	374
Martin (Pintard <i>v.</i>)	126	Roberts (Davis <i>v.</i>)	543
_____, Pleasants, & Co. <i>v.</i> Glass-cock	17	Robins <i>v.</i> Embry	207
McDonald & Rogers (Lowry & Puckett <i>v.</i>)	620	Robinson <i>v.</i> Thompson	454
McIntyre <i>v.</i> Ledyard, Hatter, & Co.	91	Rogers (Puckett <i>v.</i>)	620
Mears & Walker <i>v.</i> Winslow	449	Rowan & Harris <i>v.</i> Adams	45
Meek (Newman <i>v.</i>)	331		
Mercer <i>v.</i> Stark	479	Sample <i>v.</i> Pickens	501
Middleton (Guise <i>v.</i>)	89	Saunderson (Phillips <i>v.</i>)	462
Mills (Wilcox <i>v.</i>)	85	Shaw <i>v.</i> Thompson	628
Miller <i>v.</i> Gaskins	524	Shelton (Wright <i>v.</i>)	399
Milliken (Montgomery <i>v.</i>)	495	Shotwell <i>v.</i> Shotwell	51
Minor (Torrey <i>v.</i>)	489	Smith <i>v.</i> Walker	432
Montgomery <i>v.</i> Commercial Bk. of Rodney	632	Stacy <i>v.</i> Barker	112
Montgomery <i>v.</i> Milliken	495	Stark (Mercer <i>v.</i>)	479
Morgan & Fitz (Latham <i>v.</i>)	611	Steger <i>v.</i> Bush	172
Morton (Marshall <i>v.</i>)	563	Stone (Gwin <i>v.</i>)	124
Nayler <i>v.</i> Payne	26	Suggs (Young <i>v.</i>)	393
Neibert <i>v.</i> Withers	599		
Newman <i>v.</i> Meek	331	Terry (Hamberlin <i>v.</i>)	589
Niblett (Gibson's heirs <i>v.</i>)	278	Thompson (Robinson <i>v.</i>)	454
Nichols (Chewning <i>v.</i>)	122	_____ <i>v.</i> Shaw	628
Parker (Cotton <i>v.</i>)	125, 191	Tooley <i>v.</i> Kane	518
Parks <i>v.</i> Person	76	Torrey <i>v.</i> Minor	489
Patrick (Commissioners of Sinking Fund <i>v.</i>)	110	Truly (Dick <i>v.</i>)	557
Patterson <i>v.</i> Denton	592	Vannerson <i>v.</i> Cord	345
Payne <i>v.</i> Cowan	26		
_____(Nayler <i>v.</i>)	26	Walker (Smith <i>v.</i>)	433
Person (Parks <i>v.</i>)	76	Wall (Boisgerard <i>v.</i>)	404
Petrie (Wright <i>v.</i>)	282, 326	Warren <i>v.</i> Haley	647
Phillips <i>v.</i> Saunderson	462	Watkins (Gordon <i>v.</i>)	37
Pickens (Sample <i>v.</i>)	501	Wilcox <i>v.</i> Mills	85
_____ <i>v.</i> Harper	539	Williams <i>v.</i> Claiborne	355
Pintard <i>v.</i> Martin	126	Wilson (Fletcher <i>v.</i>)	376
Planters Bank <i>v.</i> Courtney	40	Winans (Herring <i>v.</i>)	466
Pope <i>v.</i> Andrews	135	Winn (Everett <i>v.</i>)	67
Puckett <i>v.</i> Rogers	620	Winslow (Mears & Walker <i>v.</i>)	449
		Withers (Neibert <i>v.</i>)	599
		Wright <i>v.</i> Petrie	282, 326
		_____ <i>v.</i> Shelton	399
		Yerby (Davis <i>v.</i>)	508

CASES
ARGUED AND DETERMINED
IN THE
SUPERIOR COURT OF CHANCERY
OF THE
STATE OF MISSISSIPPI,
BY THE
HON. ROBERT H. BUCKNER,
CHANCELLOR OF THE STATE.
FOR THE DECEMBER TERM, 1843, AND PREVIOUSLY,
AT JACKSON, MISS.

MARTIN PLEASANTS & Co. v. ANN M. GLASSCOCK, *et al.*

A creditor of the estate of a deceased person, cannot come into equity to subject to the satisfaction of his debt, property of the decedent in the hands of a third person, who has intermeddled with and possessed himself thereof.

In such case the creditor has a plain, adequate, and unembarrassed remedy at law.

A court of equity will entertain a bill for discovery, and an account of assets, against an executor or administrator, upon a pure legal claim.

Where a person is sought to be charged in equity as executor *de son tort*, he should be sued as a regular executor.

A bill which sets up one sufficient ground for equitable relief, and then states another upon which no relief can be had, is not thereby rendered multifarious.

In such case the defendant should demur to one part, and answer to the other; or answer generally, and object at the hearing to that part which is without claim to equitable cognizance.

To render a bill multifarious, the matters thereof must not only be separate, and distinct, but each must be of a character entitling the complainant to separate equitable relief.

If a bill be multifarious, it cannot be demurred to on that account, unless the prayer be also multifarious.

It is not necessary to make the personal representative of a deceased party a defendant to a bill filed by creditors seeking to subject a fund specifically pledged by the decedent for the payment of their debt; no claim being made upon the general assets of the estate.

Pleasants & Co. v. Glasscock, et al.

A person for whose benefit, a trust is created without his knowledge, may afterwards affirm it, and enforce its execution.

Where a complainant prays for particular relief *and* for other and further relief, he can have no relief, inconsistent with the specific relief asked, even though there may be just foundation for it in the bill; in such case, the prayer for *other relief* must be in *the disjunctive*.

THE complainants alleged in their bill that, in the year 1834, one Caleb B. Hudson, then of the county of Jackson, in the State of Alabama, died, having first made his will, which was duly probated in the county court of that county. That at the time of his death he was seized and possessed of large real and personal property. That his widow Ann M. and three children by her, and three by a former wife, survived him: that by his will, after some specific bequests to the children of his first wife, he left to his widow and her three children the rest and residue of the estate, both real and personal, the widow to have the use and enjoyment of one fourth part for her lifetime, and the children the remainder in fee simple. The bill exhibited a copy of the will.

They stated that the widow qualified as executrix, and exhibited a certificate of the county court appointing her. That, besides the house and lot named in the will, the testator owned a valuable tract of land, forty-four slaves, and other personal property; all of which property the widow, by virtue of her appointment as executrix, received into possession and cultivated the land with the negroes, and used the other personal property for the increase and improvement of the estate, until 1836, when her marriage with William H. Glasscock, of the county of Madison and State of Alabama took place, who by the laws of that State became executor in right of his wife, and so continued until his death in the fall of the year 1840.

That during the existence of the last-named marriage, William H. Glasscock, being reputed rich, and in possession of a large amount of property, contracted many debts: among the rest, several to complainants; one of \$1629·54, by note dated January 1, 1840, payable twelve months after date to James R. Maltbie or order, and by Maltbie transferred to complainant; another of \$1756, of same date, due two years after date; another of \$866·62, payable twelve months after date; another in the like sum of

Pleasants & Co. v. Glasscock, et al.

\$866.62, by bill of exchange; another by open account of \$204.27; the evidences of which were made exhibits to the bill.

That on the 24th day of April, 1840, William H. Glasscock executed a deed of trust, upon his property, to secure certain debts; *first*, to secure his overseer his wages; *second*, to provide for the expenses of an expected lawsuit; *third*, to pay any expenses of carrying the deed of trust into execution; *fourth*, to pay the indebtedness of William H. Glasscock to the estate of Caleb B. Hudson, supposed to be about eight or ten thousand dollars; *fifth*, to pay a number of persons debts due to them, upon which surety had been given, the names of the creditors being given, and also those of the sureties, but the particular amount of each respective indebtedness was not set out in the bill; and, lastly, to secure the payment of her other debts; by this deed, Mr. Glasscock conveyed all his estate, real, personal, and mixed, to one Benjamin T. Moore, who was to sell the same, in the mode prescribed in the deed of trust, which was exhibited with the bill, and pay the proceeds in discharge of the debts as recited and enumerated in the deed.

The bill further alleged that William H. Glasscock died in the fall of 1840, leaving an only son, by a former marriage, of the same name. Soon after his death, the widow moved to Mississippi and took possession of the property in this State, owned by her husband in his lifetime, and conveyed by the deed of trust, being land and negroes, in Holmes county; that she still has the same in her possession.

That W. H. Glasscock made no will, and "no administration has been taken out upon his estate."

That Moore, the trustee, being urged by the creditors, in the spring of 1841, advertised the property in Mississippi for sale under the deed of trust; that Mrs. Glasscock filed a bill in the Superior Court of Chancery of this State, and enjoined the sale, on the ground that the debt to the overseer had been paid off, the other preference debts not contracted, and that the debt due the estate of her first husband was \$13,142.91, which was the first then, of the preferred debts, and that the property she was then in possession of, and which she particularly describes, was not more than suffi-

Pleasants & Co. v. Glasscock, et al.

cient to pay the debt due her first husband's estate ; that the trustee living in Alabama, and having no interest in the matter, " did carelessly, negligently, and in fraud of the rights of the complainant and the other creditors of said Glasscock, and combining and confederating with the said Ann M., consent and agree to compromise, and did actually compromise with her ; " by permitting her to keep the property in her possession in payment of the debt due to her first husband ; upon which compromise Mrs. Glasscock dismissed her bill.

What had become of the other property conveyed by the deed of trust, which lay in Alabama, the complainants did not know, but presumed it had been sold to pay the preference debts, if any such existed after Mrs. Glasscock's claim.

The bill charged that the property in Mrs. Glasscock's possession, was in equity " applicable to the payment of complainants' debts, and should be decreed to be a fund in the hands of Mrs. Glasscock for that purpose," after paying the debt due to her ; nine thousand dollars of which, the bill charged, " was founded in injustice and fraud, and without pretence of foundation in right."

That on the 26th of January, 1839, the accounts in the Orphans' Court of Alabama, filed by Mr. and Mrs. Glasscock, showed an indebtedness *in their favor, against* the estate of Caleb B. Hudson, of \$2,148·79.

That after the death of Mr. Glasscock, in November, 1840, Mrs. Glasscock filed two accounts in the same Orphans' Court, one embracing the sums with which she was separately chargeable, and the credits to which she was separately entitled ; and the other, the account of Mr. Glasscock, as executor, with similar debts and credits.

By the first of these accounts, Mrs. Glasscock is chargeable with \$16,524·81, and to be credited with \$21,030·05, leaving a balance in her favor, of \$4,505·24, " and upon examination, it will be seen, not without surprise, that she has appropriated to herself individually, every credit to which she and her husband were jointly entitled by the account of the 26th of January, 1839, notwithstanding he, in virtue of the marriage, had been at that time in charge of the estate more than two years."

Pleasants & Co. v. Glasscock, et al.

By this account against Mr. Glasscock, he was charged with \$17,719·50, and credited with \$4,576·59, leaving a balance against him of \$13,142·91, which she had settled with the trustee. These accounts are exhibited with the bill.

The bill stated further, that a number of the items and vouchers of Mrs. Glasscock's account were receipts for payments made by W. H. Glasscock in person, and that they amount to \$7900, and should be credited to him ; another, for cotton, improperly charged, of \$1076, when added to his credits, swells the sum to \$13,422, which, deducted from his debts, leaves a balance against him of only \$4287, and this, admitting the other items to be correct, which the bill denied ; that upon this *ex parte* statement, the probate court in Alabama made a final settlement, by which they aver they are not bound, as it was accomplished by fraud, without notice to them.

The bill further alleged that, by an agreement between Mr. and Mrs. Glasscock, the planting interest of Caleb B. Hudson, in Alabama, was sold and transferred into Mississippi, by the purchase of a plantation in Holmes county in this State, for the estate of said Hudson, with the proceeds of the sale of the land in Alabama, and other payments made by himself, out of the proceeds of his own estate, for which he had never been credited, in his account with the estate of Caleb B. Hudson ; that said purchase in Holmes county was made for and on account of the estate of Hudson, and not his own account, and the loss upon that purchase, if any, should fall upon the estate of Hudson.

That Mrs. Glasscock delivered the possession of six of the negroes embraced in the deed of trust to one of her husband's relatives, who carried them off to Texas.

That they are entitled to an account of what Wm. H. Glasscock reduced to possession in his lifetime of his wife's interest in the estate of her first husband, being the life interest in one fourth part thereof.

That the fourth part of the cotton crops, and the proceeds of the sale of the land, to the year 1839, were equal to \$7485, to which they claimed to be equitably entitled.

The bill then made the various creditors recited in the deed of

Pleasants & Co. v. Glasscock, et al.

trust, the trustee, the widow and son of Wm. H. Glasscock, defendants, propounded a series of interrogatories, and concluded with the following prayer : " And on final hearing, your orators pray, that upon each and all of the grounds, hereinbefore stated and assumed, the said Ann M. be caused to pay to your orators the amount of their said debts, with interest, and for such other relief as may be consistent with the principles of equity, and suited to the nature of their case."

To this bill Mrs. Glasscock demurred.

First. Because there was no equity in the bill, upon which, as between Mrs. Glasscock and the complainants, relief could be given.

Second. Because the personal representative of Wm. H. Glasscock was not before the Court.

Third. Because the bill sought to revise the judgment of the County Court of Jackson County, Alabama.

Fourth. The bill is filed to compel the defendant to pay a debt owed by W. H. Glasscock, and does not exhibit any equitable reason for it.

Fifth. The complainants do not adopt or disclaim the provisions of the deed of trust.

Sixth. The Court has no jurisdiction.

Seventh. The bill is multifarious.

Wm. Thompson, for the Demurrer.

Mayes & Clifton, for Complainants.

By the CHANCELLOR. Wm. H. Glasscock, in his lifetime, conveyed all his property, both real, personal, and mixed, in trust, to secure and pay different specified creditors, in a given order of preference, and then to pay his creditors generally, without naming them. Among the preferred creditors was the estate of C. B. Hudson, deceased. Glasscock had intermarried with Hudson's widow, who was the executrix of the estate, and his indebtedness arose out of his relation of executor. It is alleged, that by a fraudulent agreement between the trustee in the deed of trust, and Mrs. Glasscock, the whole trust property, situate in Mississippi, was relinquished to her, in satisfaction of the debt alleged to be due said estate ; and it is charged that nothing was, in truth and in fact, due said estate at the date of

said relinquishment, and that the property was of much greater value than the debt claimed to be due. It is also alleged that there is no administration upon the estate of Glasscock, and that Mrs. Glasscock has all his property in her hands. Upon these leading facts, the complainants, claiming as creditors under the deed of trust made by Glasscock, pray specifically for a decree, for the amount of their debt against Mrs. Glasscock, and generally, for *other and further relief*. The case was submitted on the demurrer of Mrs. Glasscock, in which is assigned different causes of demurrer, extending mostly to the merits of the bill. Among other grounds taken, is, that the bill is multifarious as to the matters therein stated. Whether it was intended to charge the defendant directly with the payment of the complainants' claim upon one or both, the state of different facts set out in the bill, is not easily determined from the bill itself. She is first charged with receiving a portion of the trust fund set apart by the debtor of the complainants, for the satisfaction of their claim. She is then charged with having received, and being in the possession of, other property of said debtor. And upon this ground, I infer, it is sought to charge her with the complainants' debt. In relation to this latter ground, I take it to be clear, that there is nothing in the state of facts thus set forth which authorizes the interposition of a court of equity. A mere general creditor, holding a purely legal claim, against the estate of a deceased person, cannot come here for the satisfaction of that claim against one who has intermeddled with, and possessed himself of, that estate. In such case, the creditor has a plain, adequate, and unembarrassed remedy at law. It is true that a creditor may, upon a mere legal claim, come here for a discovery and account of assets against an executor or administrator. But this suit is not against the defendant in either of those characters. If the object of the bill was to charge her as *executrix de son tort*, she should, according to the practice upon that subject, have been sued as a regular executrix. It is clear, therefore, that the only ground stated in the bill, which gives jurisdiction to the Court, is that which charges that Mrs. Glasscock has, by a fraudulent arrangement with the trustee, obtained a portion of the trust fund, assigned, in part, for the satisfaction of the complainants' debt. Here then is one state of facts in the

Pleasants & Co. v. Glasscock, et al.

bill upon which relief may be had ; and it has been held that a bill which sets up one sufficient ground for equitable relief, and then states another, upon which no relief can be had, is not thereby rendered multifarious. *Varick v. Smith*, 5 Paige's Rep. 137.

In such case it seems the defendant should demur to one part and answer to the other, or answer generally, and object at the hearing to that part which is without claim to equitable cognizance. It seems, according to this decision, that, to render a bill multifarious, the matters thereof must not only be separate and distinct, but each must be of a character entitling the complainant to separate equitable relief. But even if the matters of the bill were clearly multifarious, yet the rule seems to be, that the bill cannot be demurred to on that account, unless the prayer thereof be also multifarious. *Dick v. Dick*, 1, Hogan, 290. Here the prayer of the bill is for single relief. But it is said that the bill is defective, because there is no personal representative of Glasscock, as a party to the bill. This, I apprehend, is not necessary. Here the complainants make no claim upon the general assets of the estate, but seek to subject a fund, specifically pledged by the intestate, in his lifetime, for the payment of their debt. This I think they have a right to do, without making the personal representative a party, even if there were any ; but here it is distinctly alleged, that there is no such representative in existence. It is next said, in support of the demurrer, that the complainants do not allege that they accepted of the provisions of the deed of trust. It is well settled that a person for whose benefit a trust is created, without his knowledge, may afterwards affirm it and enforce its execution. *Cumberland v. Codrington*, 3 John. Ch. Rep. 261. The bringing the suit in this case, I consider, amounts to such an affirmation, and to an election, to claim under the deed of trust. I have much more difficulty with reference to the prayer of the bill. It is, that Mrs. Glasscock may be decreed to pay the amount of the complainants' claim, and for other and further relief. I think I have already shown that no such direct decree can be made in the case ;—the complainants being entitled to relief, only through the medium of the trust fund. But to enforce the deed of trust would be entirely inconsistent with the prayer of the bill. It has been decided, and I think rightly,

Pleasants & Co. v. Glasscock, et al.

that where the complainant prays for particular relief, and for other and further relief, he can have no relief inconsistent with the specific relief asked, even though there may be just foundation for it in the bill. In such case, it seems the prayer for other relief must be in the disjunctive. *Colton v. Ross*, 2 Paige, Rep. 296 ; 1 Hoff. Ch. Pr. 51 (note). The prayer of the bill in this case is defective in that particular, and to that extent the demurrer must be sustained. But I think the complainants should have leave to amend upon payment of costs.

DECEMBER TERM, 1843.

A. M. & J. U. PAYNE *v.* JOHN COWAN, *et al.*
D. B. NAYLER, *et al.* *v.* A. M. PAYNE, *et al.*

The neglect of the complainants to have process served, is just ground for dissolving an injunction in the case.

The rule, in such case, is based upon the ground of negligence ; where process has been regularly sued out, but irregularly served, and the complainant proceeds to take out new process, as soon as the irregularity is discovered, the rule will not apply.

Persons not parties defendant to the original bill, have no right to file a cross-bill in the case ; but where the complainants elect to treat such proceeding as a cross-bill, by answering it, it will not be dismissed on condition before the final hearing.

Whether, in such case, any decree can be given upon such bill at the final hearing,
Quere?

Depositions, taken to be read on behalf of defendants to the original bill, upon notice given by counsel not representing any of the defendants to that bill, are irregularly taken, and will be suppressed.

It is a sufficient ground to suppress a deposition, that the witness testifying is a defendant to the original bill, and no order of Court had been given authorizing his deposition to be taken.

THE original bill in this case was filed by A. M. and J. U. Payne, against John Cowan and others, to marshal assets. John Cowan had executed a deed of trust to the complainants upon a number of negroes : this deed of trust had been foreclosed by the trustee, and the complainant A. M. Payne had become the purchaser. A number of judgments at law, some older and some younger in date than the deed of trust to the complainants, had been rendered against the defendant John Cowan, in the Circuit Court of Warren County, and the sheriff of that county was about to levy executions issuing upon these judgments, on the negroes, purchased by A. M. Payne. The complainants exhibited their bill for an injunction ; averring that John Cowan had then in possession other negroes and land unincumbered, sufficient in value to pay all the judgments and the executions thereon, then in the hands of the sheriff, of older date than the deed of trust under which they claimed. The injunction was granted.

The President, Directors, and Company of the Planters Bank of the State of Mississippi, were, among others, parties defendants to the original bill ; process was taken out immediately upon the

Payne v. Cowan. Nayler v. Payne.

filling of the bill, but was not served in the mode required by the statute. A motion was made to dissolve the injunction as to the Planters Bank, because she had not been served with process ; and the complainants immediately ordered an *alias* subpoena, upon which the president of the Bank acknowledged service.

The original bill was filed and the injunction granted on the 24th of March, 1840. On the 21st of May 1840, Daniel B. Nayler, Benjamin E. Strother, and Thomas Redwood, filed in the case a bill, which they termed a cross-bill. Neither of the complainants in the cross-bill were defendants to the original bill. The object of the complainants in the cross-bill was to attack the validity of the sale under the deed of trust at which A. M. Payne became the purchaser, in order that they might subject the property purchased by him to the satisfaction of the junior judgments against Cowan, and for other purposes, which it is not deemed requisite to notice here.

The depositions were afterwards taken, of the witnesses named in the following notice, at the time and place named in it.

"Vicksburg, August 2d, 1842. Messrs. Guion, Prentiss, and Smedes. Gentlemen : You will please take notice that on Saturday, the thirteenth instant, we will take the depositions of B. J. Hicks, James T. Hicks, A. N. Warren, John Cowan, and John H. Moseley, to be read as evidence in the cause of A. M. Payne and J. U. Payne against John Cowan and others, now pending in the Chancery Court at Jackson, in the State of Mississippi. The depositions to be taken at the Mayor's office, in the city of Vicksburg, before M. C. Folkes, mayor of the city of Vicksburg, and commissioner in chancery. Also on the same day we will take the depositions of the above-named witnesses, to be read as evidence in the case of Daniel B. Nayler, Benjamin E. Strother, and Thomas Redwood, in behalf of themselves and others against A. M. Payne, J. U. Payne, John Cowan, and others, now pending in the Chancery Court at Jackson, State of Mississippi. The deposition will be taken before M. C. Folkes, at his office in the city of Vicksburg. Brien & Hughes, solicitors."

This notice was served on John J. Guion, one of the firm of Guion, Prentiss, and Smedes, who were the counsel of record for A. M. and J. U. Payne, in the original bill.

Payne *v.* Cowan. Nayler *v.* Payne.

Messrs. Brien and Hughes were the counsel of record for D. B. Nayler, *et al.*, the complainants in the cross-bill, and were not counsel of record for any of the defendants to the original bill.

The caption to the depositions recited that the depositions were taken to be read on the trial of the original bill.

Messrs. A. M. and J. U. Payne filed their separate answers, to this cross-bill of Nayler and others ; the merits of the controversy not being at this time in issue, the contents of the pleadings are not noticed.

John Cowan was a defendant to the original bill, and a defendant to the cross-bill ; his deposition was taken as stated above ; but no order of court was of record, authorizing it.

Upon this state of fact and pleading, various motions by different parties were addressed to the Court ;

First : To dissolve the injunction against the Planters Bank, because process had not been served upon her.

Second : To take from the files the cross-bill filed by Nayler and others, and cause it to be docketed as an original bill ; 1. because the complainants in the cross-bill were not defendants to the original bill, and 2. because the "pretended cross-bill" made defendants thereto other persons than the complainants in the original bill.

Third : To suppress the depositions of James T. Hicks, Benjamin J. Hicks, John H. Mosely, and John Cowan ; 1. because Cowan was a defendant in the cause, and his deposition had been taken without leave of the Court for that purpose ; 2. because the depositions were not taken by or at the instance of any of the defendants, or the solicitors or attorneys of any of the defendants, who have filed answers in the cause, or against whom *pro confessos* have been taken, or who, under the statutes of the State or the rule of the Court, have any right to take depositions, to be used as evidence in the case.

Upon these various motions the cause was submitted to the Chancellor.

Harrison and Holt, for A. M. and J. U. Payne ; on the motion to suppress the depositions.

Payne v. Cowan. Nayler v. Payne.

By reference to the caption of these depositions and to the certificate of the commissioner, it will be seen that they were taken to be read on behalf of the defendants in the original bill. They were, as the notice shows, taken by "Brien and Hughes," solicitors for The Planters Bank, and for Nayler, Strother, and Redwood. Had either of these parties a right to take depositions in the case? The Planters Bank had not, because, although there had been an informal service of process upon her, yet she never entered her appearance until the present term, and has never filed answer, plea, or demurrer. Under the statute of Mississippi, no defendant has a right to take depositions in a cause until his answer has been filed. Nayler, Strother, and Redwood, had no right to take depositions to be used as evidence on behalf of defendants in this suit, simply because they are not defendants themselves, nor are named at all in the bill. It certainly will not be insisted that a commissioner in chancery, or any other stranger, can prepare depositions, and obtrude them upon the files of this Court. The complainants did not attend before the commissioner, because they felt themselves under no obligation to do so; knowing that the parties from whom they received the notice, and who were moving in the matter, were acting prematurely, and without legal sanctions.

It will be observed, that although in the notice addressed by Messrs. Brien and Hughes to complainants, they are informed that the depositions of some witnesses would be taken at some time and place, to be read as evidence in the case of *Nayler, Strother, and Redwood v. Payne, Cowan, &c.*, yet this does not appear to have been done, at least no such depositions are on file. Those now moved to be rejected, and which complainants were also advised would then be taken, are as distinctly shown by caption and certificate of commissioners, prepared to be used as evidence in the case of "*A. M. and J. U. Payne v. Cowan, &c.*," and prepared at the instance of persons not in a condition to take such a step in the cause.

There is also a motion to take from the files in this case, and to docket upon its own footing as an original bill, the bill of Nayler, Strother, and Redwood, prayed by them to be taken as a cross-bill against complainants, and others, and which is indorsed as a cross-bill by the clerk.

Payne v. Cowan. Nayler v. Payne.

Nayler, Strother, and Redwood on 21st May, 1840, filed their bill of complaint in this Court *v. A. M. and J. U. Payne*, and others, and pray that it may be taken as a cross-bill, to the original bill of *A. M. and J. U. Payne v. John Cowan, &c.* The clerk, inadvertently, so far grants this prayer as to lodge this bill with the papers in the case of "*Payne v. Jno. Cowan et al.*" and indorsed on it "cross-bill." But this unauthorized step and misnomer do not make it the thing it prays to be. A cross-bill must certainly be filed by those who are defendants to the original bill, and against those who are complainants therein, and against no others. Yet, we find that Nayler, Strother, and Redwood, *are not* defendants to the bill of "*A. M. and J. U. Payne v. Cowan, &c.,*" and they make defendants to their pretended cross-bill, not only A. M. and J. U. Payne, &c., in violation of the settled rule upon the subject. The motion, it seems to us, should be allowed.

With reference to the motion by Planters Bank for a dissolution of injunction, because process has not been served on her, &c., the record shows that the subpoena was executed on Planters Bank, but the informal character of the return of service did not authorize a *pro confesso*. A subsequent subpoena was issued and service of it acknowledged by the president of the Bank, and during the present term the Bank has formally entered her appearance to the suit. Surely this furnishes no ground for a dissolution of the injunction.

Robert Hughes, for complainants, in the cross-bill. The motions, made by the defendants to the original, being first in order, will first be noticed.

1. The defendants to the original bill, move the Court to dissolve the injunction, because process had not been executed, or properly issued, against the President, Directors, and Company of the Planters Bank of the State of Mississippi.

This motion was made early in December, and, on the 26th day of that month, a subpoena is asked for, and issued and executed.

Mr. Holt in his brief, in answer to the rule, insists, that it ought not to be granted, because counsel had been misled, by a return on a subpoena, as to that party. This is no answer. The rule is, that unless process is executed, or where not executed, the necessary steps taken from term to term, to procure execution, the injunction

Payne v. Cowan. Nayler v. Payne.

shall be dissolved. This is understood to be the practice — and founded upon the best of reasons — to expedite the hearing of causes. In this case, a motion was formerly made to dissolve the injunction, which was overruled, and cannot again be made, and unless the complainant is compelled to bring his cause to a hearing, the injunction may stand forever. And we do not believe the Court will permit him to take any steps, until by motion or rule, he is put in default, and then permit him to avoid the effect of the default, by doing that which ought to have previously been done.

If the injunction is dissolved, it cannot be reinstated, because there is now evidence in the cause, which shows that the matters of equity set up by the bill are untrue. This we are ready to meet, or, an application to reinstate the injunction.

2. Next come the motions of the complainants in the original bill, A. M. and J. U. Payne : we will notice them in order.

1. They move to take from the file of the papers of this cause, the paper called a cross-bill, filed by Nayler, Strother, and Redwood, because, as they insist, the complainants in said cross-bill are not defendants to the original bill, and because there are other defendants to said cross-bill besides the parties to the original bill ; and they also move to file said cross-bill as an original.

The rule is admitted that a cross-bill should be filed, by one or more of the defendants against the other parties to the bill only. But it does not necessarily follow from this admission, that the bill cannot be used and treated as a cross-bill. In order that what may be said on this subject may be properly understood, I file with this brief an abstract of the pleadings and proof which was prepared for another purpose, but which may as well be used for this. By an inspection of this abstract, it will be seen that A. M. and J. U. Payne filed their bill to prevent the sale of negroes levied on by the sheriff of Warren, as the property of John Cowan, twenty-seven of which were claimed to belong to A. M. Payne, in consequence of a purchase under a deed of trust, and two of them claimed to be subject to a deed of trust for the benefit of J. U. Payne and John Cowan, and all the plaintiffs in the execution which were older than the deed of trust, under which the complainants claim, were made parties. There were, however, other executions, which

Payne v. Cowan. Nayler v. Payne.

were levied at the same time, the plaintiffs in which were not, although they should have been, made defendants. In several of these cases, Nayler, Strother, and Redwood were the sureties of Cowan, in forthcoming bonds, and were defendants in the executions, out of whom the money had to be made, in the event that it could not be made from the property of Cowan ; so that, being interested in the proper disposition of the property of Cowan, they had a right to be heard in the cause, in some shape — and by an application on their part alleging that the property did not belong to A. M. and J. U. Payne, or either of them, the Court would have directed them to be made defendants, in order that they might have an opportunity of litigating the question with the complainants. The cross-bill, as will be seen by an inspection of it, was prepared by the late Judge Anderson, I presume, under the supposition that the complainants in it were defendants to the original bill. But they were not, and before they were made defendants, they had no right to file their cross-bill. May not this objection, however, be waived ; it is believed it may, and has been, by the acts of A. M. and J. U. Payne. They have come in and filed their answers to it, as a proper and legitimate cross-bill. For the last year or two, they have acknowledged the right of the complainants in it to contest their pretended right to the property. But now, when they are in some danger of being caught in a *fraud*, they insist that we had no right to file the bill. We presume this *new view* would never have been taken, had not the attention of counsel been called to it, by the decision of the Court, in some case during the term in December last. If the Messrs. Payne, or their counsel, intended to take such an objection, they should have done so by demurrer, or by motion to take the paper from the files before answer ; then the case would have been looked into, and, ascertaining the fact that the complainants in it were not defendants to the original bill, on petition, or upon the facts set out in the cross-bill, the Court would have ordered them to have been made defendants, and then, also, would have ordered the cross-bill to be answered. But, having failed to take this course, the objection is waived, upon the same principle that an objection to the jurisdiction is waived by answer, or, where the objection is to form, and having answered to the substance, it is too late to object to the form.

Payne v. Cowan. Nayler v. Payne.

But if the objection is properly taken, the Court will now order the complainants in the cross-bill to be made defendants to the original bill, and then will sustain the cross-bill.

The Court will never, on a mere formal objection, place parties in a position where they cannot have the benefit of a prosecution of their rights, when the matter of form can rightfully be amended. By inspection of the proof referred to, in the abstract before spoken of, it will be seen that the Paynes are attempting a most outrageous fraud upon the creditors of John Cowan ; and Nayler, Strother, and Redwood have no other means of enforcing their rights than by the plan pursued by them.

If the cross-bill has attempted to make other persons parties to it, in the defence, than those to the original bill, the result will be that, as to them, it must be dismissed ; but on that ground the bill will not be taken from the file.

By looking at the cross-bill, it will be seen that it is filed by Daniel B. Nayler, Benjamin E. Strother, and Thomas Redwood, in behalf of themselves and others, the securities for and indorsers and creditors of John Cowan, against A. M. and J. U. Payne, John Cowan, and E. W. Morris, and others, who are defendants to the original bill ; so that there are no defendants other than those who should be.

2. The next motion of the complainants in the original bill, is to suppress the depositions of James T. Hicks, Benjamin J. Hicks, John H. Mosely, and John Cowan ; and to take the same from the file.

1st. Because the said Cowan is a defendant in the cause, and this deposition has been taken without any leave of the Court for that purpose obtained.

2d. Because said depositions were not taken by or at the instance of any of the defendants, or the solicitors or attorneys of any of the defendants who have filed answers in this cause, or against whom *pro confessos* have been taken, or who have been served with process, or who, under the statutes of this State, or the rules of this Court, have any right to take depositions to be read as evidence herein.

On the objection to the deposition of John Cowan, the matter

Payne v. Cowan. Nayler v. Payne.

of examination of co-defendants, has been so often mentioned in Court, and so well understood, that it is needless to say much on the subject. An order for the examination of a witness who is a defendant, is an order of *course*, *without notice* to the opposite party, upon suggestion that he has no interest, saving exceptions to be taken at the hearing. See 1 Smith's Ch. Pr. 343.

When the deposition has been taken without such an order, and there is no other objection, we presume the Court will not suppress it only for the purpose of charging the party who has taken it with the cost, and to compel him to retake it. But we have frequently understood the Court to have decided, that objections which go to competency, cannot be taken on a motion to suppress, and *vice versa*. But, however this may be, the authority, before referred to, shows most conclusively that the *order* is a mere form, is a *matter of course*, that in fact there is no necessity for it.

As to the objections taken to all the depositions, for the purpose of having them suppressed and taken from the file, they cannot be sustained. It may be true, that the depositions have not been taken at the instance of any defendant in the original bill authorized to take them, and yet be properly taken. By reference to the notice appended to the depositions, by the commissioner before whom taken, it will be seen that "Brien and Hughes," who are counsel for Nayler, Strother, and Redwood, the complainants in the cross-bill, give notice to A. M. and J. U. Payne, that on the 13th August, 1842, the depositions will be taken, "to be read as evidence in the case of *A. M. and J. U. Payne against John Cowan, and others*," and also "to be taken to be read as evidence in the case of *Daniel B. Nayler, Benjamin Strother, and Thomas Redwood*, in behalf of themselves and others, against *A. M. and J. U. Payne, and others*;" and the commissioner in his certificate, at the conclusion of the depositions, states, "that *in pursuance of the notice hereto annexed*, I caused James T. Hicks, &c., to come, &c." True he also says, that the evidence was in behalf of the defendants in the original bill. But the notice shows that it was also taken in behalf of the complainants in the cross-cause, and that notice is referred to, for the purpose of showing between what parties the depositions are to be read. It was contemplated

Payne v. Cowan. Nayler v. Payne.

by counsel to take the depositions in both causes, but the commissioner thought that it would answer all the purposes of justice to take the depositions but once, and by the proper certificate make them apply to both causes. In this it is submitted that he acted wisely and properly. No evil can result from the course, and one set of costs is saved.

CHANCELLOR. These cases were submitted upon several motions made by either party.

1. To dissolve the injunction on the original bill as against the Planters Bank, because of the neglect of the complainants to have process served. I have repeatedly held, that the neglect of a co-complainant, in an injunction bill, to take out subpœna and have the same served in a reasonable time, is just ground for dissolving the injunction. But the rule proceeds upon the ground of negligence. Here process was duly sued out, and served; but the service was irregular and defective, and it therefore became necessary to take out a new subpœna, which seems to have been done as early as the complainants were advised of the defect in the service of the original one. There is nothing at least to show that their attention was called to it earlier than the notice given by this motion. The complainants appear to have done all their duty required, by taking out process and placing it in the hands of the proper officer; and they cannot be made responsible in this way for his errors. The motion must be overruled.

2. The motion to take from the files the bill purporting to be a *cross-bill* by Nayler, Strother, and Redwood, is made upon the ground that they are not parties defendant to the original bill. This objection would certainly have been well taken upon demurrer. But the complainants having treated it as a cross-bill by answering it, I think they cannot be heard at this stage of the case, and in this form, to make the objection. Whether any decree can be given on such a bill, is a different question, upon which I give no opinion, as I will consider it open for discussion at the final hearing.

3. The motion to suppress the depositions in the case must prevail. The commissioner states in the caption, and also in his certificate thereto, that they were taken on behalf of the defendants to the

Payne *v.* Cowan. Nayler *v.* Payne.

original bill ; but it appears that the notice was given by counsel, not representing any of the defendants to that bill who were then in an attitude to take testimony. It is true, that the notice shows an intention to take them also under the cross-bill, but the complainants to the cross-bill, we have already seen, are not defendants to the original bill, and the depositions themselves show that they were only taken as between the parties to the original bill. John Cowan, who is a defendant to the original bill, appears to have been examined as a witness without any order for that purpose. In the case of *Barden v. Gorman*, 2 Molloy, Rep. 376, this was held sufficient ground for suppressing a deposition so taken. I have no doubt upon the point of practice. Let the depositions be suppressed.

DECEMBER TERM, 1843.

JAMES GORDON, SR. v. ISAM E. WATKINS, et al.

A deposition will be suppressed only for irregularity in the taking it.

If the objection relates to the competency of the witness, it can only be made at the final hearing.

A commission is not necessary, under the present practice of this Court, to take depositions ; they can be taken on notice.

Justices of the Peace are authorized to take depositions to be read in this Court.

The evidence of service of a notice to take depositions, must be by the return of the sheriff, or affidavit of the party serving the notice.

In this case, a motion was entered to suppress the deposition of a witness, who was also a party to the suit and a surety on the injunction bond.

No commission had been taken out of the clerk's office to take the deposition ; but a regular notice, made out by the defendant's counsel, appeared with the depositions, on which was the following return. "I do certify that I delivered to John Handy, complainant's attorney, a true copy of the above notice, on the 12th day of January, 1844. N. J. Watkins."

The deposition was taken before a Justice of the Peace.

A. H. Handy, in support of the motion.

W. Yerger, contra.

By the CHANCELLOR. A motion to suppress a deposition cannot be sustained where the grounds of the motion relate to the competency of the witness ; because where the motion is sustained, the Court always grants leave to retake the same. Such questions can only be made at the final hearing. A motion to suppress depositions can only be founded upon irregularities in taking them.

Under the present practice of the Court, it is not necessary to take out a commission, but it is considered sufficient, and has been so held by this Court, merely to give notice to the opposite party of

Gordon v. Watkins, et al.

the time and place of taking the deposition, and have it sworn to before an officer authorized to administer an oath.

It has been, I think, the uniform practice in this State, for Justices of the Peace to take depositions to be read in this Court, and I am not disposed to alter it.

(The Chancellor here inquired of the late Chancellor Quitman, if this had not been the uniform practice while he presided in this Court.)

Chancellor Quitman. That was the practice.

CHANCELLOR. Although the objections that I have reviewed are not sufficient to destroy this deposition, it must be however, for an objection not taken, suppressed. The notice is irregular and insufficient. It is as follows. "I do certify that I delivered to John Handy, complainant's attorney, a true copy of the above notice, on the 12th day of January, 1844. N. J. Watkins."

It does not appear that N. J. Watkins was a sheriff, or an officer authorized to serve a notice, and his certificate is not sworn to. One or the other of these two things must be done to constitute sufficient evidence to the commissioner, or officer taking the deposition, or to this Court, that the opposite counsel have received due notice, that the deposition will be taken.

A sheriff has power to serve notices of this kind, and his return, when made as sheriff, becomes of itself evidence.

If the notice is given by any one but an officer, the evidence of the service must be under the oath of the party serving it.

Let the depositions be suppressed.

Yerger. Not being aware of any deficiency in the certificate of service, I am taken by surprise in the case, and I ask your Honor that the cause may be continued, and that I may have leave to retake the depositions.

Handy. The case is ready for hearing ; the depositions were defectively taken, and the Court will not on that account delay the trial of the cause.

CHANCELLOR. I shall unquestionably give the defendant time to retake the depositions. The notice may have been regularly given, though it does not appear so to the Court from the records ; the probability is that it was regular.

Gordon v. Watkins, et al.

Handy. I withdraw, then, my motion to suppress the depositions.

Yerger. I object to that ; it is too late. The depositions are suppressed, and I ask your Honor what time you will grant me to retake them ?

CHANCELLOR. The counsel has a right to withdraw his motion, and I shall so enter it.

DECEMBER TERM, 1843.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE PLANTERS
BANK OF THE STATE OF MISSISSIPPI v. EDWARD J. COURTNEY.

Where the original notes, given by the mortgagor of a tract of land for the purchase-money, are taken up, and new ones substituted instead by the vendee, and the vendor files his bill to enforce his equitable lien, the answer of the vendee, that the new notes were received in satisfaction and discharge of that lien, is not evidence.

Where a cause is submitted for final hearing, and some point in the case is left unproved, or is not sufficiently explained, it is in the power and discretion of the Chancellor to remand the case to the docket, and direct it to stand over for further proof.

THE complainants, in their bill, alleged that in the year 1838, one William F. Courtney bought of Edward J. Pinkerton a lot of ground in the town of Manchester, in this State; that Courtney, to secure part of the purchase-money, executed his two notes to Pinkerton, which they purport to exhibit with the bill, for twelve hundred dollars each, for the payment of which it was stipulated, in the deed from Pinkerton to Courtney, that the lot was to be bound, until both the notes were fully paid and satisfied. The bill further stated, that Pinkerton had assigned the notes to the complainants; that since the assignment of the notes to them, the lot had been sold under execution, to one Francis Ilsley, who had sold it to one Henry Courtney, who had sold it to the defendant; that the defendant, and those through whom he claimed, had each notice of the complainant's equity, and the bill therefore prayed a foreclosure and sale.

The answer of Courtney admitted the sale from Pinkerton to William F. Courtney, and its terms, but denied that the notes held by the complainants, and exhibited with their bill, were the original notes given by William F. Courtney, and for the payment of which the land was bound. That those two notes had been cancelled and were in his possession, and he accordingly exhibits what he represents to be them, with his answer; that Pinkerton came to W. F. Courtney and told him, notes secured by lien on the

The Planters Bank *v.* Courtney.

land would not answer his purpose, which was to have them discounted at bank, and proposed that the first notes should be cancelled and new ones made, secured by personal security, and that he, Pinkerton, would receive them in full discharge of the two original notes ; that this arrangement was entered into, the two original notes were given up to W. F. Courtney, and the two filed with the bill were substituted in lieu thereof, *and were received in payment and satisfaction of the two original notes.*

He admitted the mode stated in the bill, by which he derived his title, to be true, and insisted that he held the land freed and discharged from the lien of the original notes.

The cause was submitted upon bill, answer, and exhibits, for final hearing.

Wilkinson, and Miles, for complainants.

Upon the state of facts exhibited in the pleadings, it becomes necessary to inquire into the legal effect of the *reserved lien* in the deed of conveyance.

We submit that its effect is the same as though an absolute conveyance had been made, and *eo instanti* a mortgage executed to secure the payment of the purchase-money.

It is a contract incorporated in the deed itself, that the land conveyed shall remain subject to the payment of a stipulated sum ; and amounts to a conditional conveyance only. From the terms of the deed, it is evident, the parties intended to create a subsisting lien upon the land, of a higher and more permanent character than the ordinary lien raised by implication of law, in favor of the vendor.

Regarding the conveyance, then, as an equitable mortgage, or as a conditional sale, creating by express provision a lien for the purchase-money, there can be no doubt that a transfer of the notes thus secured, invests the holders of them with all the equities subsisting in favor of the assignor. 5 Wend. Rep. 615 ; 5 Con. Rep. 202 ; 1 John. Rep. 590 ; and complainants may enforce their payment in the same manner, and to the same extent, as might have been done by the assignor.

If this position be correct, the sale that took place under the execution against William F. Courtney, and the subsequent conveyances that have taken place, do not in the least impair the rights of complain-

The Planters Bank v. Courtney.

ants. 1 John. Cha. Rep. 298 ; ib. 394 ; 4 ib. 70 ; ib. 262 ; 5 Paige, Cha. Rep. 104 ; 1 Brock. Rep. 316 ; 1 Leigh, Rep. 520.

At all events, the *record* evidence of the non-payment of the sum secured in the deed, was enough to excite a suspicion in the mind of a prudent man, as to the validity of Courtney's title ; and courts of equity have always held that to be sufficient to put a man on inquiry. 1 Atkins, Rep. 489 ; 16 Vesey, 250.

Concluding that what is stated in the answer, in reference to taking up the *two* notes originally executed, and giving the two now held by complainants in their stead, to be true, yet it does not alter the question. For it surely need not be argued, at this day, that a mortgage given to secure a *note* will also stand good for a renewal of that note.

The statement in the answer, that it was agreed between the parties to disregard or abolish the *lien* or security reserved in the deed, is irresponsible to the bill, is not supported by proof, and must therefore go for nothing.

If this conveyance be regarded in the light of an equitable mortgage to secure the payment of the purchase-money, the fact of having personal security in addition, will not detract from its force or validity.

No one can doubt that the object of the parties was to secure the payment of the two \$1200 notes. The books hold, without a dissenting opinion, that *every* contract for the *security* of money, by the conveyance of property, and *real estate* in particular, is a mortgage. 7 John. Ch. Rep. 40 ; 7 Cranch, Rep. 218 ; 5 Litt. 85 ; 5 Paige, Rep. 9 ; 2 J. J. Mar. Rep. 471 ; Dev. Eq. Rep. 373 ; 3 Yerger, Rep. 459 ; 1 Rand. Rep. 306 ; 3 Wend. Rep. 208 ; 17 Serg. & Rawle, 70 ; 4 Hen. & Mun. Rep. 101 ; 12 Mass. Rep. 456 ; 6 Monroe's Rep. 120.

It may be objected that, inasmuch as the deed of conveyance was not signed by William F. Courtney, the vendor, he is therefore not bound by its provisions. But such is not the law. In all covenants, a person whose name is mentioned therein, who is a party to the transaction on which they are predicated, and who is to be charged or benefited thereby, is as much bound by the terms of the covenant, as though he had signed it. See Platt on Covenants, page 10 - 18 ; 1st vol. Law Library, 5 - 9; Cro. Jac. 240; 1 Bulstr.

The Planters Bank v. Courtney.

Rep. 21 ; 3 ib. 163 ; 1 Mod. Rep. 291, 292 ; Co. Litt. 231 a ; 5 Barn. & Cres. 596 ; 8 Dow & Ry. 368 ; 1 Vesey & Bea. 14.

G. S. Yerger, for defendant.

The answer in this case states that the two notes mentioned in the mortgage were by agreement satisfied and paid, by substituting two others with personal security ; and as evidence of the fact, the answer exhibits the two notes referred to, which are in defendant's possession, and cancelled.

The notes referred to by complainant do not appear to be executed to Pinkerton, but to a man by the name of Walker. There is not the slightest evidence in the case showing that these two notes are the ones mentioned in the deed. The deed does not describe them as two notes payable to Walker, &c., but simply two notes for \$1200 each.

The answer denies that these two notes were the notes mentioned in the deed, but states that the two referred to in the answer, and payable to Pinkerton, were the two secured.

It is true the answer says, the two embraced in it were taken up and paid by the two notes mentioned by complainant, but it expressly says, that they were given in payment of the two which were secured.

This is not like the case where the answer *admits* a fact, and then affirmatively avoids it. Such affirmative avoidance must, it is admitted, be proved. *But in this case there is no admission in the answer, that the notes referred to by complainant were those secured or intended to be secured by the answer.* If it had admitted them to be the notes secured, and then endeavored to avoid them, by saying they were paid by other notes, the latter fact would have to be proved. But the answer, so far from admitting this, expressly denies it, and says the two notes made to Pinkerton were the ones mentioned in the deed. How then can the complainant get his notes in as those secured by the deed ? *He says* they were mere renewals of, or substitutes for, the first ; but where is the evidence of this ? the answer does not say so : it says they were received in payment and extinguishment of the two which were embraced in the deed. The complainant is wholly without proof that the deed ever was a security for his two notes.

The Planters Bank *v.* Courtney.

2. The deed merely retains a *lien* — it is not a lien coupled with an interest, as in case of mortgage. It is merely a vendor's lien. It is a naked lien, which the assignment of the notes, if they were really embraced, extinguished.

The High Court has decided that the lien of a vendor is extinguished by an assignment of the note. Such, also, was the decision of the Chancellor, in that case. And the lien given by Act of Assembly to executors' sales, &c., is not assignable.

Whether the statement in the answer, that the plaintiff's notes were taken in payment or satisfaction, is to be proved or not, can make no difference, because, whether they are or not, there is no admission in the answer, or proof in the bond, showing that they are the notes secured by the deed. The rule is, "*What is confessed or admitted in the answer, need not be proved, &c., but matter which avoids what is admitted must be proved.*" 2 John. Ch. Rep. 89 ; 2 Bibb. 38.

In this case there is no admission that the notes of complainant were embraced in the deed, and consequently this must be proved.

By the CHANCELLOR. The right of the complainants to enforce the lien set up in this case, must depend upon whether the present notes were received in satisfaction and discharge of that lien or not. The answer states they were so received. But I incline to think that part of the answer is not evidence. It is true, that the only evidence by which the complainant is enabled to connect the present notes, with the deed under which the lien is retained, is derived from the statement of the answer. I am satisfied that the merits of the case cannot be reached without some explanatory proof as to the intended effect of the new notes. I shall accordingly remand the case to the docket, and direct it to stand over for further proof upon this point, which the parties will be at liberty to take. Upon reference to the English practice, I find a discretion of this kind has been frequently exercised by the English Chancellors, where some point in the case is left unproved, or is not sufficiently explained. 1 Hoff. Pr. 498, and authorities there cited.

JANUARY TERM, 1843.

ROWAN AND HARRIS v. GEORGE W. ADAMS, et al.

Money paid upon an illegal consideration cannot be recovered back.

R. & H. introduced negroes into this State since the first of May, 1833, as merchandise and for sale, and sold them to H. G. R., and took in payment for them the notes of A., payable to H. G. R., and by H. G. R. indorsed, secured by mortgage on a tract of land ; held, upon this state of fact, that R. & H. were entitled to foreclose the mortgage given by A. and assigned in payment of the illegal consideration by H. G. R. to R. & H.

A vendee having purchased negroes, introduced into the State, in violation of the Constitution, cannot, in a court of equity, escape the payment of the purchase-money, without offering to surrender back the slaves and account for their hire.

Taking property in payment of a pre-existing debt, does not make the buyer a purchaser for valuable consideration, in the eye of the law, as against one holding a prior equity.

W., being about to purchase a tract of land, was informed that R. & H. had "*some sort of claim to it* ;" held that this was sufficient to put W. upon the inquiry.

THE brief of Messrs. Harrison and Holt presents a very full and detailed statement of the facts, exhibited by the pleadings in the cause.

Harrison and Holt, for complainants. It appears from the bill, that on the 7th of December, 1837, defendant George W. Adams being indebted to H. G. Runnels, in the sum of \$26,034, made and delivered to him his three several promissory notes, for \$8671·33 $\frac{1}{4}$ each ; payable on the 1st of March, 1839, 1840, and 1841 ; and to secure their payment, executed to him a mortgage, conveying a tract of land, in the deed of mortgage and bill particularly described, which deed of mortgage was duly acknowledged and recorded in the proper county. Shortly after the execution of the deed of mortgage, Runnels assigned and delivered said three promissory notes to complainants, and in formal terms invested them with the right to control said mortgage.

The first of said notes, maturing 1st March, 1839, having been paid or settled, this bill was exhibited by complainants, as the holders of the remaining two notes, to foreclose the mortgage, and sell the land for their payment. George W. Adams, the drawer of the notes, was made a defendant, and he having since died, his unknown heirs have been brought before the Court on bill of revi-

Rowan and Harris v. Adams, et al.

vor, and the allegations of the bill have been taken *as confessed against them*. H. G. Runnells, who assigned the notes and mortgage to complainants, being also a defendant, has filed his answer, in which he protests against a decree in favor of complainants, on the ground, that the consideration of the transfer and delivery of the notes was the sale of slaves to him by complainants, which they had introduced into this State as merchandise, since 1st May, 1833. He makes his answer a cross-bill against complainants, and prays that his assignment of the notes may be vacated, and the notes decreed to be redelivered to him. He also alleges, that after having transferred the notes and mortgage, and consequently all his interest in the lands to complainants, he again sold the same lands to one John Watt, who, he insists, is entitled to hold them. He admits that the consideration upon which Adams executed the notes, was the sale to him by Runnells of these same lands, and that he (Runnells) conveyed the lands by regular and formal deed to Adams, by whom the deed was lost before it was recorded. Complainants pray also, that this lost deed may be set up. They, by amended bill, make John Watt a defendant, alleging that when he purchased the lands, he was aware in law and fact of their interest in them, and bought subject to their mortgage. Watt, in his answer, admits that when he purchased of Runnells, he was informed by him, that complainants had some pretended claim to the lands, but was assured that the claim was unfounded, and that the sale made by Runnells to Adams had been cancelled. The information received was sufficient to put him upon inquiry, and that inquiry, if prosecuted, would have put him in possession of every fact now disclosed by the pleadings. The records of the county apprised him of the existence of the mortgage, and he must have known that complainants were the holders of the notes, for through them alone could they derive an interest in the lands, and he was bound to know that Runnells had no power to cancel his contract with Adams, after he had transferred the notes and mortgage.

Such being the aspect of the case, it seems to us that the only question worthy of attention, is that growing out of the "negro plea" of Runnells. He has sold the lands, twice, at enormous prices, and has *been twice paid for them*, and although he is but a

Rowan and Harris v. Adams, et al.

formal party to this suit, and no decree is sought against him, yet, as a mere *connoisseur* in matters of equity and conscience, he asks to be sustained in the receipt of this double payment, merely for the sake of the principle involved. It is true, that he is not without interest in the controversy, for if he can succeed in having the notes redelivered to him, and can then collect them of the estate of Adams, he will be *thrice paid for his lands*, once by Adams, once by complainants, and once by John Watt.

The heirs of Adams, knowing the consideration on which the notes were executed, to have been good and valuable, offer no resistance to the decree ; and it may be well doubted, whether they could do so, however much inclined, simply because the consideration of the assignment, with which they had no connection, was defective. But, whatever might be the right of Adams, we deny, utterly, that Runnells can be heard to make the defence which is urged in his answer. Universal as is the "negro plea," and fondly as it is hugged to the heart of the moral code of Mississippi, it has never been regarded as broad enough to cover the ground assumed in this case. Under the shelter of that plea, the citizens of the State have been protected in the enjoyment of thousands of slaves, imported from different portions of the republic without paying for them. But even among the most sanguine of the believers in the saving efficacy of this defence, it has never been supposed that it would enable the purchaser, who had paid for the slaves, to recover back the purchase-money, and hold the slaves, and the earnings of their labor also ; we can find no adjudged case recognizing such a principle. On the contrary, the law leaves parties thus circumstanced as it finds them.

Runnells *paid* the notes in question to complainants, for slaves which he purchased of them, without offering to return these slaves, or account for their value or hire : he now asks to recover back the very notes which he paid for them. If he can do this, money paid under like circumstances could be recovered back in this Court, and in a court of law. The principle is the same whether the payment be made in money, lands, or choses in action.

When Watt was informed by Runnells, that he had previously sold the lands to Adams, but that the contract with Adams was

Rowan and Harris v. Adams, et al.

subsequently cancelled, he knew that his informant had no interest in giving him correct information on the subject, and he should have made inquiry of Adams, or the holders of the notes, whoever they might be. This was a duty which he owed to the adversary claimant, and which, had he performed, he would have readily ascertained that Runnells had no right to sell. He entered into the contract blindly, regardless of others' rights, intent only on seizing this *tabula in naufragio*, from a bankrupt debtor. He might gain, but could not lose,—certainly he is not a *bonâ fide* purchaser for a valuable consideration, without notice. All this averment in regard to assurance given him by Runnells of the cancellation of the contract, is *new matter*, and is not proved. It is probable that this branch of the case might be properly pretermitted by the Chancellor, and that it would arise more legitimately in a subsequent suit between the purchaser of the mortgaged premises at a sale made by the commissioner, and John Watt, who, at the instance of the former, would, we think, be decreed to surrender his title.

W. Yerger, for H. G. Runnells. That the consideration of the indorsement was illegal and void, and the indorsement therefore void, has been repeatedly decided by the High Court. Reference is made to *Green v. Robinson*, 5 Howard, 80; *Glidewell et al. v. Hite*, 5 ib. 110; *Cowen v. Boyce*, 5 ib. 769.

It is a maxim in Equity, that "he who hath committed iniquity, shall not have equity." *Fonblanche's Eq.* 127.

Where parties are concerned in illegal agreements or other transactions, a court of equity will not interfere to grant any relief, nor give countenance to claims of the sort. 1 Story's Eq. 295, 296, and note (2).

These rules being applied, the bill of complainants, being an attempt to enforce the foreclosure of a mortgage, in furtherance of an illegal contract, will be dismissed.

Montgomery and Boyd, for defendant Watt.

By the CHANCELLOR. Runnells sold a tract of land to Adams, and made a deed thereto. Adams gave a mortgage to Runnells, on the same land, to secure the payment of the notes given for the purchase-money. The deed was not recorded, but was lost.

Rowan and Harris v. Adams, et al.

Runnells transferred the notes of Adams to the complainants, in consideration of the purchase of some negro slaves, introduced into this State in violation of the constitution. Runnells resists the foreclosure of the mortgage, by answer and cross-bill, upon the ground of the invalidity of the consideration of the transfer of the notes, and alleges as an excuse therefor that a number of the negroes were unsound. This defence is unavailable.

1. Because the notes were transferred, in *payment for the negroes*. To allow this relief would sanction the idea that money paid on such a consideration may be recovered back, in violation of the maxim, *in pari delicto melior est conditio defendantis*.

2. Because he does not offer to surrender back the slaves, and account for their hire, but merely says he is ready to do what is equitable in the case.

3. The illegality of the consideration for the transfer does not invalidate the mortgage, with which it has no connection.

It appears that after the transfer of the notes by Runnells to the complainants, he agreed to rescind the contract of sale with Adams, and then again sold the same land to the defendant Watt, in discharge of a pre-existing debt.

Watt's title cannot prevail against the mortgage, for two reasons.

1. Because he is not a *bonâ fide* purchaser for valuable consideration as against the complainants' prior equity; he parted with neither money nor property, he advanced no new consideration, nor relinquished any pre-existing security for his debt; taking property in payment of a precedent debt does not make the buyer a purchaser for valuable consideration in the eye of the law, as against one holding a prior equity.

2. He admits that Runnells informed him that the complainants had some sort of claim upon the land. He then had notice. It was his duty to have inquired into the character of this claim, when he would have learned its true character. The title to the land passed completely and perfectly, from Runnells to Adams, upon the execution and delivery of the deed, and the subsequent loss of that deed, in no way impaired the strength of that title, as between Adams and Runnells; nor did the verbal cancellation, as I infer it

50 SUPERIOR COURT OF CHANCERY.

Rowan and Harris v. Adams, et al.

was, of the contract of sale, divest Adams's title under the deed, or in any way affect the validity of the previously *executed* and transferred mortgage. A court of equity would, if necessary to perfect the title to a purchaser under the mortgage, compel Runnels to supply the place of the lost deed by making a new one.

Let the case be referred to the clerk to compute the amount of the mortgage-money, upon the report of which a final decree of foreclosure, dismissing the cross-bill, may be drawn.

Shotwell v. Shotwell.

DECEMBER TERM, 1843.

MARY E. A. SHOTWELL v. ROBERT SHOTWELL.

Where, upon the bill of the wife against the husband, a decree *a vinculo matrimonii* has been granted, the mere omission in that decree, to provide for the alimony of the wife, cannot affect the wife's right to such a provision, at a subsequent time, by a separate and distinct proceeding.

A circuit court, having decreed a divorce *a vinculo matrimonii* at the instance of the wife, the Superior Court of Chancery has jurisdiction of a bill by the divorced wife against the husband, to have alimony allotted to her.

A decree for alimony *results* from the decree for a divorce, but is not *identical* with it, or a necessary part of it.

THE complainant alleges in her bill, that she and the defendant intermarried in this State, in 1826 : that she lately filed her bill, in the Circuit Court of Lowndes county, against the defendant, for a divorce from the bonds of matrimony, for causes of adultery, and that that Court, for those causes, by decree, rendered in January, 1840, granted a decree of divorce, *a vinculo matrimonii*. That by said decree no provision was made for her alimony, nor did that question enter into the pleadings in that cause, and no account was taken of the property which Shotwell held, as trustee of the complainant, but that question was reserved for the disposition of this Court : that at the time of the marriage the defendant was possessed of the following property, *to wit* : two male slaves, worth about \$1000 ; that in about twelve months thereafter, the complainant's father, L. B. Taliafferro, gave defendant, in consideration of his marriage, and as a marriage *advance* to the complainant, eight slaves, and other property specified in the bill, worth, at that time, about \$2750, and afterwards paid to her, for the use of her husband, \$350 : that in December, 1837, the defendant purchased six other negroes, which were chiefly paid for with the proceeds of the joint labor of the complainant, the defendant, and the slaves : that she made defendant, during their coverture, until the unhappy causes of difference occurred, an economical and good wife : that by the aid of her industry, they had amassed a considerable fortune, and that at the time of the decree of divorce, the defendant was worth \$13,000,

Shotwell v. Shotwell.

consisting of lands, negroes, &c. On account of which she charges an allowance should be made to her for alimony, and that the defendant should be held a trustee, and responsible for the portion of the estate to which she is entitled: that the defendant refuses to make any allowance to her, &c. She prays that the defendant set forth in his answer his effects, &c., and finally a decree for alimony and for her equitable property.

To this bill the defendant demurred, and set out two special causes.

First. That it appeared by the bill, that the complainant was, and had been for a long time, absolutely and finally divorced by a court of competent jurisdiction, from the defendant, and her intermarriage with him unconditionally annulled.

Second. That the Court had no jurisdiction for a bill of alimony, after a decree of divorce *a vinculo matrimonii* had been rendered.

The case was submitted to the Chancellor, by consent, upon written arguments.

George Calhoun, in support of the demurrer.

A bill was heretofore filed by the complainant against the defendant, before the present Chancellor of this State, sitting at Columbus, similar to the present, which was dismissed. To that bill there was a demurrer, for causes similar to those assigned in this demurrer; and as the solicitors for the defendant made an extensive investigation of the subject in that case, I beg leave to call the attention of your Honor to their brief, herewith enclosed.

This bill assumes the position, not taken in that, that the defendant holds the property advanced to him by complainant's father, and his other property, in trust for her, to the extent of an equitable allowance to her for alimony. The Court of Chancery in England has no jurisdiction in cases for alimony, except to enforce the decrees of the Spiritual Court, or upon cases of litigation growing out of alimony, already decreed. In this State the statute gives concurrent jurisdiction to the Chancery Court, and circuit courts, to grant divorces and decree alimony, and it expressly confers the power to decree alimony on the court which grants the *divorce*. Hence, we infer that this Court has no jurisdiction over the subject

Shotwell v. Shotwell.

of alimony, except on a bill for a divorce. For if the Chancery Court has no original jurisdiction to decree it, in England, on the ground that it is a mere incident to a divorce, it is difficult to perceive on what principle this Court can assume it, after another court has granted the divorce. Certainly the same rules which apply to man and wife in England, apply to them in this country. On this subject, and for the general doctrine applicable to this case, see 2 Story's Com. on Eq. 648, and note 3, et seq.; 2 Vesey, 195, and authorities there cited; Clancy, on Married Women, 549, 550; Roper, on Husband and Wife, 278; 6 John. Ch. Rep. 91.

I cannot perceive upon what principle of reason or authority the husband can be held to be a trustee for the wife, after a divorce, in regard to his estate. If the wife has a separate estate, which comes to the possession of the husband, he is regarded as a trustee for her; but in this case, so far from alleging in the bill that she has a separate estate in the property given by her father to defendant, the complainant alleges that it was given to him in consideration of the marriage, and as a marriage advance to complainant. Of course it vested in him. See 1 Bacon's Ab. 290; Clancy, on Married Women, p. 2. As to the manner in which the wife can acquire a separate estate, I beg leave to refer the Court to Clancy, on Married Women, under the head of separate estate of the wife, (the book is not now before me,) where he enumerates the different modes of creating it, and it will be seen complainant has no such interest in the negroes given by her father to defendant. It is held, as will be seen by reference to the authorities referred to, that alimony is a mere incident to a divorce. The divorce is the principal, and draws with it alimony as an incident, and the Circuit Court having acted upon the one subject, necessarily had before it the other; its decree, therefore, is a bar to all proceeding on the subject, in any other court. If not, however, and anything was left undone, that is the only court which can complete it. The doctrine, if established, that after a decree of divorce, *a vinculo matrimonii*, the wife can at all times, and in all courts, sue the husband for alimony, would open a new door to vexatious litigation and multiplicity of suits, unknown, it is believed, at this time to the law.

Shotwell v. Shotwell.

But again : the record of the proceedings on the bill for divorce (made part of complainant's bill), shows that full provision was made by defendant for the support of complainant. His answer charges that said provision was accepted by her, and her father as next friend, in lieu of a decree for alimony ; and prays, if alimony is decreed, that the deed conveying the negroes and bank stock, for her benefit, be set aside. The fact that she accepted the divorce, without objecting to this provision, not only shows a good reason why that court did not decree alimony, but also that she was provided for and satisfied. This property she yet holds, and although this Court would have jurisdiction over this property, to enforce this settlement, it is believed it extends no farther over the subject.

Neither in justice, equity, nor law, is the complainant, as appears from her own bill, entitled to any further relief.

The following is the argument referred to by Mr. Calhoun, and made part of his brief :

The defendant demurs, first, because the bill shows an absolute unconditional final divorce, *a vinculo matrimonii*, long since decreed between the parties.

2d. Because the bill shows that the divorce was granted by a different court, of concurrent jurisdiction ; and in divorces of that description, alimony is a mere incident, and properly cognizable at the time ; and a subject that might and ought to have been there litigated. This Court will not now take jurisdiction of the cause ; for, in all cases of concurrent jurisdiction, the court which first had possession of the subject matter must determine it conclusively. The Court is bound to inquire, in every case, whether the facts presented by the record give jurisdiction. 3 Howard's Rep. 34. This bill seeks to recover alimony. What is alimony ? It is, says Blackstone, "that allowance which is made to a *married woman* out of her *husband's* estate. 1 Black. Com. 441. In a legal sense, it is taken for that allowance which a *married woman* sues for, and is entitled to, *upon separation* from her husband." 1 Tomlin's Law Dictionary, 67, title Alimony, Baron and Feme, XI. 1 Jacobs's Law Dictionary, 80. In England, it appears that alimony is allowed only where a separation is decreed. *Rhame v. Rhame*, 1 M'Cord, Ch. R. 205. In cases of divorce *a mensa et*

Shotwell v. Shotwell.

thoro, the law allows alimony. 1 Black. Com. 441. "On these separations from *bed and board*, the courts intrusted with the jurisdiction of the subject will make suitable provision for the support of the wife and children, &c. 2 Kent's Com. 127.

In England the jurisdiction of cases of alimony belongs to the ecclesiastical courts. Baron and Feme, 434; 1 M'Cord, Ch. R. 205; *Burtes v. Burtes*, Hopk. 478. And in that country, in divorces *a vinculo matrimonii*, the marriage is declared *absolutely void*. 1 Black. Com. 440. The marriage is pronounced null, as having been absolutely unlawful *ab initio*. 1 Black. Com. 440. Divorces, like the one mentioned in the bill *a vinculo matrimonii* for adultery, could not be granted by an act of Parliament in England. 1 Black. Com. 441. Accordingly, we will find no precedent for this bill in the English books. No alimony was ever granted in England, in a case of divorce *a vinculo matrimonii*. In divorces *a mensa et thoro* it was different, for such a divorce does not *dissolve* the marriage, though it separates the parties, and establishes different interests between them. 5 Pickering's Rep. 461. "A divorce *a mensa et thoro* only, does not *dissolve* the marriage, for the parties can live together as man and wife again without any new ceremony." 2 Pickering, R. 316. "If a husband and wife are divorced *a mensa et thoro*, (and a legacy is left to her,) the husband may release it, for such divorce does not *dissolve* the marriage." 2 Roll's Ab. 301; Cro. Eliz. 908; Baron and Feme, 433; 1 Jacobs's Law Dictionary, 287, and cases cited. The marriage continues, and the wife, after such divorce, shall have dower of her husband's lands. Baron and Feme, 433. If a baron and feme are divorced *a vinculo matrimonii*, dower ceaseth, but not if it be only *a mensa et thoro*. 1 Inst. 32 a, Hilliard's Ab. 61. "The right of a husband in the land of his wife, being an estate during *coverture*, is terminated by a divorce *a vinculo matrimonii*." 8 Conn. R. 541; 2 Pickering, 316; 4 Amer. C. L. Rep. 535. When the relation of marriage is *dissolved* by the death of the husband, the wife is restored to all her rights, which were lost by the *coverture*; when it is dissolved by a divorce *a vinculo matrimonii*, the law is the same. 8 Conn. R. 541; 4 Amer. C. L. 535. On the dissolution of a marriage, either by the death of the husband, or a divorce *a vinculo matrimonii*, choses in

Shotwell v. Shotwell.

action, not reduced to possession during the coverture, remain the property of the wife. *Legg v. Legg*, 8 Mass. R. 101; *Barber v. Root*, 10 Mass. R. 260—265. It is clear, therefore, that the divorce heretofore decreed between these parties, has the same effect as the *death* of one of them; they are to each other as if *dead*, so far as all the conjugal relations are concerned, and the jurisdiction of this Court is concerned. Indeed, marriage itself is but a civil contract. 1 Black. Com. 433. “Taking it in this light, the law treats it like it does all other contracts.” Idem. 433. After the contract is *annulled*, the relation of man and wife no longer exists; all connection between them has ceased and determined. But the law of England concerning divorces, is chiefly the ecclesiastical law, and not the common law of that country; and it has never been adopted in this State. Our statutes concerning divorces are original regulations, and they do not adopt or introduce the English law of divorces. *Burtes v. Burtes*, Hopk. 478; 1 Equity Dig. 262, sec. 4. Alimony may be given immediately, as on a divorce under the statute of Indiana, but no court has any original jurisdiction to allow it. Hence, if an adequate provision be not made by the court granting the divorce, no other court can supply the deficiency. *Fishli v. Fishli*, 1 Black. 361; Conover’s Digest Index, 202, sec. 8.

It is precisely the same under our statute concerning “Divorces and Alimony.” It is enacted, that “when a divorce shall be decreed, &c. &c., the court shall, and may in every case, take such order touching the care and maintenance of the children of that marriage; and also, touching the maintenance and ALIMONY of the wife, or any allowance to be made to her, and if any, the security to be given for the same, as, from the circumstances of the parties, may be fit, equitable, and just.” Rev. Code, 229, sec. 7; Hutch. & How. 331, sec. 17. The statute, by the first section, gives to the Court of Chancery jurisdiction of “all causes of divorce,” by the act directed and allowed, and, by the seventh section, makes “alimony, if any,” an incident, when the divorce shall be decreed, and that the court granting the divorce shall take such order touching the alimony as may be equitable and just. There is no statute in this State which gives any court separate jurisdiction in

Shotwell *v.* Shotwell.

cases of alimony. By the revised constitution it is provided that the legislature may give to the circuit courts of each county equity jurisdiction in all cases of "divorce." Const. art. 4, sec. 16. It was given by the act of May 2d, 1833. Hutch. and How. 480, sec. 3. Neither the constitution nor act of 1833 speak of alimony, and the act of 1822 treats of it only as an incident to the divorce, and to be granted *when* the divorce is decreed.

"No court has any original jurisdiction to give a wife a separate maintenance; but it may be given *immediately* as on a *supplicavit* in chancery, or a divorce *a mensa et thoro propter sacratum* in the Ecclesiastical Court." *Bale v. Montgomery*, 2 Vesey, Ch. R. 195; Ham. Eq. Digest. 200.

As has been before stated, our statute laws concerning divorces are original regulations, and in England no alimony was ever granted by any of the courts, in divorces *a vinculo matrimonii*. In the United States the statute law often provides for a divorce, for causes which in England render the marriage void *ab initio*, (Hilliard's Ab. 61,) and as by our statute, for causes which in England would not authorize a divorce from the bonds of matrimony. In New York, and in Massachusetts, alimony is granted upon a divorce *a vinculo matrimonii*, but it is by express statute, and is decreed *at the time*, as a mere incident to the divorce. N. Y. Revised Statutes, vol. 2, p. 145; 2 Kent, Com. 99; Revised Statutes of Massachusetts, 1835, part 2, tit. 7, ch. 76, sec. 27, 29. The cases, therefore, reported in Paige's Chancery Reports, and in Pickering's Massachusetts Reports, are to be understood as having reference to the *statute law*, as the second ground of demurrer. The divorce was obtained before a circuit court Judge, and in all cases of concurrent jurisdiction, the court which first had possession of the subject-matter must determine it conclusively. *Smith v. M'Iver*, 7 Wheaton, 532; 5 Cond. Rep. 662; 1 Ashmead's Rep. 171; *Thompson v. Hill*, 3 Yerger, 167; 2 Munsford, 34; 2 Equity Digest, 24. And so far is this principle extended, that "when a wife obtained in Kentucky a decree for a divorce, with an allowance for alimony in her husband's property, in that State, it was held in Indiana, that, though the maintenance was inadequate, she could make no application to the courts of the latter

Shotwell *v.* Shotwell.

State for any additional provision out of her husband's real property located within Indiana. The matter had been finally determined by a competent tribunal ; it is considered as at rest forever. And this principle embraces not only *what was actually determined, but every other matter which the parties might have litigated in the cause.* *Fishli v. Fishli*, 1 Black. 361 ; Conover's Dig. Ind. 202.

The law abhors a multiplicity of suits. Besides, by our statute, alimony is granted by the court decreeing the divorce, by a mere "order" to that effect. "When" a divorce is granted, &c., the court shall and may take such *order*, &c., is the language of the statute.*

Stephen Cocke, for complainant, in support of the bill.

The case presented is the following.

The complainant filed her bill for a divorce *a vinculo*, against the defendant for adultery, in the Circuit Court of Lowndes county. On the 10th day of January, 1840, that Court decreed the divorce *a vinculo*, founded on the adultery charged and proved.

In that case there was no other question presented by the pleadings or proofs, and nothing else was determined.

She now files her present bill in the Superior Court of Chancery for alimony, and to obtain what may be found to be her equitable property, consequent upon the violation of the nuptial contract by the husband.

To this bill the defendant demurs on the grounds :

1st. That, by the said decree of the Circuit Court, the said marriage is now, and has been, dissolved and annulled.

2d. That the Chancery Court has no jurisdiction of this cause, and is bound to dismiss the bill.

For the complainant it is contended that the demurrer, confessing as it does the allegations of the bill, presents as equitable the monstrous position that, in marriage causes, a husband by the marriage acquires title to all the personal property of the wife, and that by committing the crime of adultery, he gives her cause of divorce *a vinculo*, which, if she obtains, throws her a beggar on the world, and leaves him entitled, not only to the property she placed in the nuptial stock with its increase, but also all that which her industry and good management contributed to amass. Whereas it is em-

* NOTE. This brief was prepared by Messrs. Hains and Harrison, and adopted by Mr. Calhoun.

Shotwell v. Shotwell.

phatically true, that no man can be permitted to make property by the violation of a duty, the commission of a crime, or the breach of a contract.

By the adultery, the defendant submits himself and his property to the jurisdiction of the Court of Chancery, and when the husband has violated the marriage contract, or been guilty of an act which entitles the wife to a decree for a divorce, or for a separation and alimony, the wife is equitably entitled to a restitution of the property which the husband holds by virtue of his marital rights. *Vandoza v. Vandoza*, 6 Paige, R. 366.

The cause for divorce having been decided in the Circuit Court, the demurrer to the present bill is founded on the idea, that those proceedings present a bar to the inquiries sought by the present bill.

The matters of the demurrer may well be considered of by reference to the statutes of Mississippi, and the constitution of this State.

We subscribe to the doctrine that our statutes concerning divorces are original regulations, and that they do not adopt the English law of divorces ; *Burtis v. Burtis*, Hopk. R. 557 ; they being of ecclesiastical cognizances. Indeed, so diversified are the causes for divorces in different countries, and so variant are the rights and duties in the marital life under different municipal jurisdictions, that it could not be otherwise. In every country the rights of property, and other allowances consequent on the dissolution of the marriage tie, must depend on the local policy of the particular country. In Mississippi, whatever may be her defections in other respects, her tribunals have not yet given sanction to the doctrine that it is in the power of the husband, by committing the crime of adultery, to acquire to himself all of his wife's property, and leave her destitute and a beggar on the world. We think, however, we may regard the decisions of our sister States, as entitled to much respect on the subject of the rights of the wife, consequent on a divorce *a vinculo*, for the criminal or improper conduct of the husband. In cases of concurrent jurisdiction, a complainant may come into chancery for relief, if he thinks proper to do so, subject to the power of the Court to refuse him his costs, when he files his bill unnecessarily. *Mitchell v. Oakley*, 7 Paige, R. 68 ; 4 ib. 647.

Shotwell *v.* Shotwell.

When the party's remedy was in another court, but at the time of trial such remedy is not understood, nor ascertained, the jurisdiction of equity is maintainable. *Bynum, et al. v. Sledge*, 1 Stew. and Porter, R. 135.

Upon a decree for divorce *a vinculo*, the property which came to the husband by means of the marriage will be restored to the wife. *Dean v. Dean*, 5 Pick. R. 428.

The Court will order the husband's property to be applied to the support of his wife and family, not only during the litigation, but after the decree of divorce. *Kirby v. Kirby*, 1 Paige, R. 261.

On divorce for adultery, the wife is entitled to alimony. *Graves v. Graves*, 2 Paige, R. 62.

But to the statute laws of Mississippi. These laws, as compiled by Howard and Hutchinson on the subject of divorces, with reference to the jurisdiction of the courts, present the subject in too confused a form for satisfactory investigation. Our inquiries in this respect will be better directed by referring to Poindexter's code, and the acts of the legislature of 1833.

By the act of the 14th of June, 1822, revised code, ch. 36, p. 228, sec. 1, the *Court of Chancery* shall have jurisdiction of all causes of divorce; sec. 2, the like process and course of practice and proceedings shall be had and pursued in causes of divorce as are usually had and pursued in other causes in chancery, except the answer of the defendants shall not be under oath. At sec. 7, p. 229, a distinct, independent, and enlarged power is given to the Court (that is, the Court of Chancery), to take such order touching the maintenance and alimony of the wife, or any allowance to be made to her, and of any of the security to be given for the same, as from the circumstances of the parties, and the nature of the case, may be fit, equitable, and just. But no such provision is made as to the power of the circuit courts.

By the revised constitution, judicial department, sec. 16, a separate Superior Court of Chancery shall be established with full jurisdiction in all matters of equity, provided, however, the legislature may give to the circuit courts of each county equity jurisdiction, in all cases where the value of the thing or amount in controversy does not exceed four hundred dollars; and also in all cases of divorce and for the foreclosure of mortgages.

Shotwell v. Shotwell.

The legislature of 1833 (consolidated acts from 1824 to 1838, p. 404, sec. 6), enacts that the said circuit courts shall have and possess original and concurrent jurisdiction with the Superior Court of Chancery over all matters, pleas, and plaints whatsoever belonging to or cognizable in a court of equity, when the value of the thing or amount in controversy does not exceed the value of five hundred dollars, also in cases of divorce and for the foreclosure of mortgages ; and such process and course of proceedings shall be had herein as in similar cases are commonly had in the Superior Court of Chancery. This latter provision was intended to indicate only the process and course of proceedings that was given to the Chancery Court by the act of 1822, as above pointed out in sec. 2, revised code, p. 228, and did not contemplate the exercise of the powers designated and pointed out by sec. 7, p. 229, for the reason that the legislature must have foreseen that questions of the equitable property of the wife and her allowance for alimony, might well invite conflict of litigation with other interests and parties, determinable alone by a Superior Court of Chancery, with full chancery jurisdiction ; and besides, the constitution had pointed out a jurisdiction only to declare the divorce, and this was all that was sought or obtained in the case before us in the Circuit Court.

It may be, that in cases of divorce *a mensa et thoro*, or to make an allowance to the wife during the litigation, or to enable her to prosecute her suit *a vinculo*, would be within the competency of the circuit courts. But in divorces *a vinculo*, to fix the permanent alimony of the wife, or in any manner to settle her equitable property, we cannot find was contemplated in the laws as for the jurisdiction of the circuit courts. To include those matters in such an investigation, would usually delay the final hearing of the divorce case for years. It would, in almost every instance, bring into conflict and litigation other interests and other parties.

It is obvious that, by such a divorce, the wife is entitled to rehave the property she brought to the husband, as also alimony. What was the legal or equitable disposition and situation of that property in reference to the claim of others, might be of doubtful intendment both of law and fact, and could not well be determined in a suit for a divorce. Again, the amount of alimony to be allowed to the wife, would essentially depend upon the property-situation of

Shotwell *v.* Shotwell.

the husband. Whether the property claimed to be his, was really his or not, would have to be ascertained before alimony could be had of it : this might well affect the interests of others, and bring about a litigation in that behalf, which would take years to settle, and involve amounts greatly beyond \$500. The constitutional right of the circuit courts to settle such controversies, might well be questioned ; and during all this time, however gross and improper the conduct of the husband, the just claims of the wife for the separation and for her separate property and alimony, would be delayed and circumscribed with all the restraints of marriage, unless indeed she would consent to relinquish all claims to a comfortable support in the society to which she had been accustomed, and become a beggar. Such a rule of practice is not thought to be consonant with equity, or the just interpretation which should be given to our statute law. Even in cases to foreclose mortgages, when the interests of third persons become involved beyond \$500, the circuit courts are believed to have no jurisdiction.

The divorce in the present case, although it was *a vinculo* as to the wife, was only a *mensa et thoro* as to the husband. How. and Hutch. p. 719, sec. 1. Upon the husband, therefore, devolved and continued the duty and obligation to provide for the wife, whether the acquisitions were before or after the divorce. *Kirby v. Kirby*, 1 Paige, R. 261.

We are aware that this rule may be said to be in effect altered by the act which passed after the divorce, in the year 1842.

But we submit whether this act can be allowed to impair any of the rights of the wife, which attached as a consequence of the decree of the 10th of January, 1840.

It is said, however, that alimony is an incident of the decree of a divorce, and must be settled in the decree dissolving the marriage. It is true, it is an incident ; but it by no means follows that alimony or the equitable property of the wife ought or can be at all times settled with the decree dissolving the marriage. At best it would be a mere rule of practice, and it seems to us, the better and more appropriate practice would be to settle those matters in a separate proceeding, when the restraints of marriage shall have disappeared. At law, the right to recover mesne profits is an incident to the recovery in an action of eject-

Shotwell v. Shotwell.

ment, yet we all know we have to prosecute a separate action afterwards for the recovery of mesne profits. It is for the reason, that it would greatly embarrass the trial of the ejectment cause, if the other matter was permitted to mingle with it. Much greater would be the embarrassments in seeking to obtain a divorce *a vinculo*, if we were obliged to settle and include in the decree all of the incidents and consequences of the divorce, before an innocent and virtuous woman could free herself from an adulterous husband. There were, however, in the proceedings for a divorce, none of these matters in the pleadings or proofs in that cause. There were no allegations on the subject ; no *res judicata*, as to any of the matters of this present bill.

The rule is, that the judgment of a court of concurrent jurisdiction directly upon the point, is conclusive between the same parties upon the same matter directly in question in another court. But it is not evidence of any matter which came collaterally in question, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument. 1 Phil. on Ev., Library edition, p. 333 ; The Duchess of Kingston's case, 20 Howell, 538.

In considering the effect of a former judgment, it is to be observed, that the judgment can be final only for its own proper purpose and object, with reference to the subject-matter of the suit, and upon the points then put in issue and directly determined. 1 Phil. Ev. 334.

If a court of law having jurisdiction declines to determine a question of set-off, this is not *res judicata*, so as to preclude an inquiry in a court of equity having concurrent jurisdiction. *Hackett v. Connell*, 3 Evid. 73.

To make a decree a good bar in a subsequent suit, it must be shown that the matter of the bill was *res judicata*. Chase's case, 1 Bland. 220.

A decree made upon a bill and answer cannot affect the rights of any of the parties, as to the other matters which were not the subject of litigation in that suit. *Elliot v. Pell*, 1 Paige, 263.

A mistake in a former decree, in a cause where the same persons were parties, but on a point in which their interests at that time were not in litigation, is not conclusive upon the parties in a subse-

Shotwell *v.* Shotwell.

quent suit, when that point comes in litigation between them. *Garrett v. Day*, 2 M'Cord's R. 27.

In the brief of the solicitor for the defendant, it is stated that the record of the proceedings, on the bill for divorce, made part of the complainant's bill; shows that full provision was made by defendant for the support of complainant, in charging in his answer that said provision was accepted by her, and her father as next friend, in lieu of a decree for alimony, and proves that the complainant was provided for and satisfied.

We deny that any just provision was ever made by defendant for complainant, or that she was ever in any respect settled with, or satisfied, in that respect. If defendant has made satisfactory provision for complainant, he may well set it up, and avail himself of it, in his answer to the present bill. It is not conceived how any such matter can avail him on his demurrer.

A wife before the decree cannot make any valid agreement as to her allowance of alimony. It belongs to the Court of Chancery to settle, sanction, and allow the amount. *Daggett v. Daggett*, 5 Paige, 509.

It is hoped that the Chancellor will look into the matter in the present case, and cause that to be done in the premises which of right and justice ought to be done.

CHANCELLOR. In January, 1840, the complainant obtained a divorce from the bonds of matrimony, against the defendant, in the Circuit Court of Lowndes county, on the charge of adultery. That case proceeded simply for a divorce. The question as to the wife's right to alimony was not in contest. The present bill is filed for the purpose of asserting her claim to alimony; and to this the defendant has demurred generally. Two grounds are taken in support of the demurrer. 1. That the power of this Court to decree alimony, in any case, depends altogether upon the provisions of the statute upon that subject; and that, by that statute, the power to make such decree belongs to the court that grants the divorce. 2. That alimony is an incident to, and dependent upon, the decree for a divorce; and that, as no decree was made by the Circuit Court for alimony, when the divorce was decreed, a separate bill

Shotwell v. Shotwell.

for that purpose cannot be maintained in this Court. These positions are so nearly the same, that an answer to one will dispose of both. The statute of this State provides that, when a divorce is decreed for adultery, the Court may make such order touching the alimony of the wife, or any allowance to be made her, as from the circumstances of the parties, and the nature of the case, may be fit, equitable, and just. And although I believe it has been usual in practice, to make such order in connection with the decree for a divorce, yet I cannot conceive that the mere omission to do so can affect the wife's right to such a provision, at a subsequent time, by a separate and distinct proceeding. Any other construction of the statute would place the rights of the wife under restrictions too arbitrary to comport with the generous policy of the law. The error of the opposite view, consists in supposing that a bill for a divorce and a claim for alimony are identical, and necessarily constitute one proceeding, and that they are essentially united in the same decree; whereas the right to alimony is a separate and distinct right *resulting* from the decree for a divorce, but not identical with it. The wife's right to a provision in such cases, proceeds upon the moral and legal obligation of the husband to furnish her with a competent support, and cannot be justly made to depend upon the point of time at which she attempts to assert it. I find no such limitation in the statute, and I certainly will not introduce any by way of construction. The right is founded in the very nature and legal incidents of the marriage contract, by which the husband not only possesses himself of the property of the wife, but obtains dominion over her person. Hence it is, that where the husband, by his cruelty or other misconduct, compels the wife to force herself from him, the courts will carry out this obligation by compelling him to set apart a portion of his estate for her support. I am then of opinion, that a separate suit, by bill or petition, may be maintained for alimony, after a decree for a divorce in which such claim was omitted, if there was no express act of the wife waiving her right thereto. This point seems to have been directly decided by the Supreme Court of Pennsylvania, in the case of *M'Karraher v. M'Karraher* (3 Yates, Rep. 56). It was held in that case, that the failure of the wife to claim alimony, when the

Shotwell v. Shotwell.

sentence of divorce was rendered, was no bar to a future application for that purpose. The case of *Julineau v. Julineau* (2 Desaus. 45) is also an authority, showing that the decree for alimony is not necessarily an integral part of the decree for a divorce. I also infer, from some examination of the Ecclesiastical Reports of England, that a claim to alimony is not necessarily asserted, at the same time that a sentence of divorce is pronounced ; I find it is frequently, if not usually, made at a different time, and under a distinct proceeding. Such was the case in the suit of *Cook v. Cook*, 2 Phillimore, 40 ; 1 Eccle. Rep. 178 ; where a divorce was decreed in Nov. 1811, and proceedings instituted in March, 1812, for the recovery of alimony. The propriety of the proceeding does not appear to have been called in question on account of the lapse of time. Sir John Nicholl said it was usual to make alimony commence from the date of the sentence of separation, and he referred to the case of *Taylor v. Taylor*, where the sentence and decree for alimony passed on the same day ; thus showing that it was not usual that both took place at the same time. I cannot doubt that the powers of this Court, as to decreeing alimony, are commensurate with those of the spiritual courts of England. If, then, a separate bill or petition for alimony may be maintained, I can see no reason why it may not be brought in any court having competent jurisdiction, without regard to the court that granted the divorce. There is nothing in the nature of the proceeding which would limit it to the latter court. In England, the jurisdiction over divorces and alimony belongs exclusively to the ecclesiastical courts, and was never exercised by the Court of Chancery, except during the usurpation of Cromwell, when the spiritual courts were shut up. But by the constitution and laws of the State, jurisdiction is conferred equally upon the chancery and circuit courts ; and where one has not already taken jurisdiction, the other may do so. If these views be correct, neither of the grounds of demurrer are well taken. Let it be overruled, and the defendant ordered to answer in thirty days.

DECEMBER TERM, 1843.

WILLIAM EVERETT v. A. M. WINN, et al.

A cause cannot be submitted against the consent of the complainant, for final hearing, at the same term of the court at which the answers are filed: the complainant is entitled to the succeeding term to take testimony.

A complainant making application to amend a *scorn* bill, after the answer of the defendant is filed, must show that the proposed amendment contains matter important to his rights, and which was unknown to him at the time of filing his original bill, or else he must show a special reason which will excuse him from negligence in the matter.

An assignor of a note, who has parted with all his right in it, and has no interest in the matters in controversy, and against whom no relief or discovery is prayed, *held*, on demurrer, not to be a necessary party to the bill.

A trustee, to sell property, who has advertised it for sale, being the mere agent of the *cestui que trust*, and without interest in the controversy, is a proper party to a bill filed to enjoin the sale of the property embraced in the trust, on the ground of a fraudulent combination on the part of the *cestui que trust* and another person, to defraud the complainant of his right in the trust property.

An agreement between two parties, that one shall hold in his name the property of the other, and shall pay with it the debts of the latter, and use it as he may direct, is such an agreement as a court of equity will enforce, *as between the parties*; and it can only be assailed, at the instance of creditors who are thereby defrauded.

E. files his bill, stating that he held property of W. in secret trust for the benefit of W., and to secure advances of himself for W.'s account, that W. was in arrears for money then advanced in a large sum, and had fraudulently procured G. to become the purchaser with W.'s money at a tax sale of the property so held by E., and seeking to subject the property in the hands of G. to the advance so made; *held*, that a court of equity would have jurisdiction of the case; upon the answer, however, of G., denying the fraud, and it not being established by proof, the jurisdiction would cease.

THE brief of Mr. Smedes furnishes a full abstract of the case.

The original bill was filed November 8, 1841. The answers of Winn and Genella, and the demurrer of Walker and Meilke, were filed on the 4th January, 1842, and the cause placed on the hearing-docket, at the same term to which the answers and demurrer were filed.

An affidavit for a continuance, and a petition to file an amended bill, were submitted, with the case, when the hearing-docket was called.

P. W. Tompkins, for complainants.

W. C. Smedes, for defendants.

The bill in this case charges that the defendant, Winn, being in

Everett v. Winn, et al.

possession of real estate, and having executions against him levied on said estate, procured the complainant to buy the lands in secret trust, for said Winn and his family ; and complainant paid out of his own pocket \$7349, to effect the purchase. The bill states that complainant sold part of this land to W. H. Hurst, and thereby paid \$14,000 of the debts of said Winn ; another part he sold to Winn's wife ; that Winn retained the possession of all the land bought by complainant, and rented some of it at \$50 per month ; that it was the understanding between complainant and Winn, that Winn should have the use of said property, pay the taxes and expenses, and reimburse complainant for his advances, in which event complainant was to convey the property to the order of Winn. Winn did not reimburse complainant, or pay the taxes, so that the tax-collector levied on lot 22, square 7, in the city of Vicksburg, and lot 10 in square 2, and sold the same ; that defendant Genella at said tax sale was the purchaser, and refuses to permit the complainant to redeem except according to law. The bill further alleges, that complainant borrowed from defendant Meilke \$2000 of the sum he invested for defendant Winn. Complainant executed a deed of trust to defendant Walker, on said property of Winn's, to secure Meilke in payment of said debt. Complainant sets out payments to Meilke of different sums, and avers a balance of only \$308 to be due Meilke. Complainant, however, alleges the loan to have been "*usurious and illegal* ;" and that, in point of fact, only \$217.25 is due on said loan. Complainant charges that Winn has procured Genella to purchase said note and deed of trust, for Winn's benefit, and has procured defendant Walker to advertise said property for sale under said deed of trust for 700 and odd dollars, which complainant avers is a scheme by Winn and Genella to defraud complainant out of his lien for advances for Winn, which he avers have not been repaid him by \$1000. The bill makes all the above parties defendants ; prays for an injunction of the sale of said lots ; that the tax sales may be annulled and set aside, — because of the fraud of Winn, and the participation in it of Genella, and because Genella bought for the benefit of Winn, prays an account and a decree to enforce the lien of complainant for his advances upon said property, and other relief, &c.

Everett v. Winn, et al.

To this bill defendants Genella and Winn have answered, and defendants Meilke and Walker demurred; Genella and Winn's answers are also made demurrs.

Genella's answer sets forth the belief of defendant, from information of the truth of the bill in relation to the secret trusts; but does not admit the payments by complainant, and calls for proof, if it should be necessary. Defendant admits the sales to Hurst and Winn's family from information; but denies that Winn has been in possession of the property in controversy since the tax sales, and avers possession in himself, and entire control. Defendant denies all knowledge of the secret understanding between Winn and Everett, until after the filing of complainant's bill; since that period Winn has informed him that they are, in the main, true. Defendant avers that Winn has more than reimbursed complainant for advances. Defendant admits that Winn did not pay the taxes; and has been informed by him that the reason was, because complainant had practised a fraud on him, by, without his knowledge or consent, giving a deed of trust on the property to Meilke, and one to Rigby, to secure the individual debts of Everett. Defendant admits the purchase at tax sale, but denies the collusion with Winn, or that the sale was for the use of Winn, or with his money. The denial of fraud and collusion is as full as language can make it. States that Winn had no interest in the property. Respondent admits he requires the law to be strictly complied with before he will permit a redemption; states that he knows nothing of the contract between complainant and Meilke, or the usury charged, if any. Denies that complainant has paid all the debt but 300 and odd dollars; but states that \$709 is due. He admits the purchase of the note and deed of trust, but denies fraud, &c. States it was made *bonâ fide* with his own money, and to perfect his tax title; and that Winn had nothing to do with it. The denials of fraud are very full. The defendant states that before he purchased said note and deed of trust, "*he informed complainant of his intention to do so,*" and asked complainant for a statement of how much was due said Meilke on said note, and complainant informed him that \$709 was due. The answer admits that the trustee was about to sell, when enjoined for said sum of \$709; but denies again all fraud and collusion with

Everett v. Winn, et al.

Winn, in inducing the trustee to sell. In conclusion, the defendant sets up an absolute title in fee simple to said property, by virtue of three tax deeds, which he files as exhibits (1), (2), and (3), and denies any lien to exist in complainant; denies all fraud, and prays the bill to be dismissed, &c. The answer also denies that the charges of usury, being so vague and uncertain, can be noticed.

The answer of defendant, Winn, sets forth the admission of the secret trusts, but a denial of the sum claimed to be advanced. Defendant sets up an indebtedness to him of \$1392·03 by complainant, being the sum paid by him to complainant over and above complainant's advances. Respondent admits he did not pay the taxes, but gives as a reason, the fraud of Everett, in giving Meilke and Rigby deeds of trust, without his knowledge or consent, upon the property in controversy. Respondent denies all fraud, &c., and adopts Genella's answer as his own, and charges fraud on complainant, to such an extent as to make him unfit to come for redress into a court of chancery, and demurs to the bill accordingly. Respondent knows nothing of the transaction between Meilke and complainant; but states that before Genella bought the note and deed of trust, complainant informed respondent that \$709 was due Meilke thereon. Respondent denies all fraud, and all indebtedness to complainant, and all interest in the premises in controversy, &c.

The defendants, Meilke and Walker, demur for want of equity, &c. The complainant comes into Court avowing a *secret* and *fraudulent* trust, and yet asks relief. His hands are not clean, nor can a court of equity wash them clean. The very basis of complainant's claim to relief is *fraud*; and he has exposed a secret and systematic attempt to cloak and hide the true ownership of real estate, that the Chancellor ought to put his foot upon forever. And, not content with defrauding the public and Winn's creditors, the very bill shows, and the answers prove, that he has defrauded Winn himself; for these and other reasons, Meilke and Walker have demurred to the bill.

They contend, first, that complainant's agreement with Winn was a gross fraud upon the public and the creditors of Winn, and ought to close the doors of a court of equity upon him forever; and that Genella, not participating in, and ignorant of, said fraud and secret trusts, is not bound by them. 1 Story, Eq. 70.

Everett v. Winn, et al.

Secondly. That complainant having induced Genella to buy the note and deed of trust for \$709, cannot now show a less sum to be due. *Hamer v. Johnston, et al.*, 5 How. 698.

Thirdly. That the charges of usury are so clumsily made as to amount to nothing ; the amount of usurious interest charged, not being set out ; and the bill making no offer to pay what is really due. In the absence of which allegation, the Court will dismiss the bill. Fonbl. Eq. Book 1, ch. 1 ; 1 Story, Eq. 300, 301 ; and 5 John. Rep. 142, &c. ; 1 Story, Eq. 77.

Fourthly. The defendant, Genella, has an indefeasible title, by virtue of his tax deeds. The period of redemption has passed, and no tender even pretended. How. and H. page 104. A court of equity will not disturb a legal title, or grant relief against a *bona fide* purchaser of the legal estate for valuable consideration, without notice. 1 Story, Eq. 75, ch. 3, sec. 57.

We might amplify at great length, but deem it unnecessary. Upon any one of the above four grounds we think the Chancellor will “dissolve the injunction and dismiss the bill.”

As to the application to file the amended bill, we will only say a few words. The original bill was filed in November, 1841, and the answers thereto January 4, 1842. The amended bill is sworn to on the 31st of January, after the case is set down for hearing, and but a few days before submission. The matter set up in the amended bill was all known to complainant, when he filed his original bill, and ought to have been inserted in it, if material, and no excuse is shown or offered for not doing so. It is, however, wholly immaterial, consisting of charges and accounts against A. M. Winn, as to the secret trusts in relation to the lands, and reaverring a participation in the fraud of complainant and defendant, Winn, on the part of Genella. A fact so fully denied in their answers to the original bill, that it would be worse than useless to repeat the denials. The controversy in this case is *not* between Winn and Everett, but between *Genella* and Everett. And the amended bill offers nothing that can affect that controversy ; and, for the reasons above given, should not be allowed. Coop. Eq. 333. “The plaintiff must apply to the court for an order to amend in proper time ; that is, generally, before the suit is at issue, &c.”

Everett v. Winn, et al.

In April, 1842, being the continuation of the January term, 1842, the same term at which the case was submitted, the Chancellor delivered the following opinion.

CHANCELLOR. At the January term, 1842, the counsel for the defendants urged the submission of this case as on final hearing, whilst the complainant asked for a continuance, and craved leave to file an amended bill, which was then offered. The suit was returnable to that term of the Court, and, according to a well-settled rule of practice, the complainant was entitled to have until the succeeding term to take testimony, as against the defendants who filed their answers to that term. The case then could not be properly submitted, except as to the two defendants who have demurred to the bill. I perceive no reason, whatever, for giving leave to the complainants to file an amended bill. The application comes too late. It is not pretended that anything there stated was not well known to the complainant when he filed and *swore* to his original bill; nor is there anything stated in it which may not be made matter of proof under the original bill. Permission to amend sworn bills is granted with great caution, and especially after the coming in of the answer. In that state of the case, the complainant must show that the proposed amendment contains matter which is important to his rights, and which was unknown to him at the time of filing his original bill, or some other special reason, which will excuse him from negligence in the matter. *Rogers v. Rogers*, 1 Paige, Ch. 424; *Whitmarsh v. Campbell*, 2 Paige, Ch. 67. Leave to amend is therefore refused. In the present aspect of the case, nothing remains but to dispose of the demurrer of the defendants Meilke and Walker. Meilke having assigned and transferred his interest in the note and deed of trust to Genella, he has no longer any direct interest in the matter. No relief or discovery is prayed as against him, the demurrer therefore as to him, is sustained, and the bill dismissed to that extent. As to Walker, it is clear that in advertising to sell under the deed of trust, he acted as the mere agent of Genella, and if the complainant is entitled to relief against Genella, by reason of his alleged fraudulent combination with Winn, it is quite clear that he would be entitled to an injunction against Walker,

Everett v. Winn, et al.

who is a mere agent under the deed of trust, without interest in the controversy. Walker's power under the deed depends essentially upon Genella's right to enforce it. If it should appear, upon the final hearing, that the tax sale of the lot of land, and the purchase of the deed of trust, was the result of a scheme between Winn and Genella to overreach the interests of the complainant, I should think, as at present advised, that there could not be much doubt about the complainant's right to relief. It seems that such an agreement, as that stated to have been made between the complainant and the defendant Winn, is such an one as the law will enforce, as between the parties. (*Orr et al. v. Pickett et al.*,) 3 J. J. Marshall's Rep. 276. Such an agreement would only be assailable, at the instance of creditors, who are thereby defrauded. The demurrer as to Walker must be overruled, with leave to answer in thirty days.

The case was, upon the delivery of this opinion, remanded to the hearing docket, and commissions opened to take depositions.

A. Genella proved that J. Genella, the defendant, purchased the deed of trust in controversy, and lots at tax sales, *with his own money, and for his own use*. That A. M. Winn was utterly without means, and never furnished one cent of money to J. Genella, but was, on the contrary, considerably indebted to him. That he was present at the tax sales, and the complainant was also present, and made no objection to the sale, and that when J. Genella purchased Meilke's deed of trust, he did so *after his tax purchases*, at the request of complainant, who told defendant \$709 was due Meilke, and said not one word of usury; but, on the contrary, told him, if he would purchase that deed of trust, his title to the lot would be perfect.

E. B. Scarborough proved that he sold the lot at tax sale *regularly*. That defendant Genella paid him the purchase-money, and he made him a deed. That *Everett was present and assented to the sale*. The witness also furnished, with his deposition, a copy of the advertisement and assessment of Winn's property, and states that Winn had a negro boy in possession, when his real estate sold for taxes.

Everett v. Winn, et al.

E. C. Meilke proved that he bought Everett's note (and did not discount it) for \$2000, from a Mr. Briggs.

E. W. Morris proved the payment of certain moneys from Everett, for the property in controversy with some other.

Watson Flowers proved that Winn had a negro boy in possession in 1837, and ever since.

David Steele proved that *Briggs asked Meilke* if he had got his money from Everett, and Meilke answered, not all, and Briggs said he was to have \$40 out of it.

This was all the proof. The case was at the January term, 1843, again submitted for final hearing.

P. W. Tompkins, for complainants.

Guion and Smedes, for defendants.

The Chancellor, in his opinion already given in this case, says, "The complainant is entitled to relief against Genella, by reason of his alleged fraudulent combination with Winn."

No such fraud or combination is proved. A great part of the depositions taken seems to be without object or point. It is in clear and full proof, that Genella purchased the deed of trust for \$709 with Everett's consent and statement that so much was due, and that both the deed of trust and tax moneys came from Genella himself, and for his own use ; and that Winn furnished nothing, and has no interest whatever in the property. It is also in proof, that Everett was present at the sale, and assented to it.

We cannot conceive upon what ground complainant will resist a decree dismissing the bill as to defendant Genella ; and as to Winn, the complainant is not entitled to a decree against him ; his remedy is at law.

From a portion of the depositions, we presume an attempt by argument will be made, to show that Genella acquired no title by the tax sales, because Winn had personal property, and because of irregular assessment.

In the present aspect of the case, neither proof nor argument to that point can be allowed.

The bill does not impeach the regularity of the tax sales, but only seeks to subject the property to Winn's debt, by reason of Genella's fraud (10th page of the bill). For the defendant

Everett v. Winn, et al.

Genella, therefore, we do not offer either proof or argument, on the subject of the regularity of the sale.

We refer to our brief, heretofore filed in this cause, for an abstract and brief of the case, and upon the points presented by it.

The CHANCELLOR delivered the following brief opinion. The right of the complainant to any relief as against the defendant Genella, rests entirely on the allegation of fraud in the several transactions detailed in the bill. The charge of fraud is fully denied by the answer of Genella, and the proof fails altogether to sustain it. There is no ground for equity jurisdiction laid by the bill as against Winn, except the charge of fraudulent combination with Genella; this is disproved. If Winn is indebted to the complainant for money paid to his use, he has a clear remedy at law, and this defect is insisted upon by way of demurrer in the answer. Let the bill be dismissed at the complainant's costs.

Parks v. Person, et al.

DECEMBER TERM, 1843.

AUSTIN P. PARKS v. JAMES J. PERSON, et al.

The return of satisfaction upon an execution, though false, so far extinguishes the lien of the judgment upon which the execution issued, that property of the defendant, in the execution sold *subsequent* to the return, would no longer be subject to it.

Alier, if the false return is made after sale of property of the defendants. In such case, on the return being vacated, the lien would still exist on the property previously sold. It is wholly irregular to set aside a return of satisfaction upon an execution, in a court of law, without notice, *at least*, to the defendant in the execution; such a proceeding is absolutely void.

Whether, where the vacating a false return upon an execution will affect the rights of subsequent purchasers from the defendant in the execution, these subsequent purchasers are entitled to notice of the proceedings. *Quare.*

THE bill in this case charges, that *some time prior to the 18th of April*, 1840, John M. Scott sold a negro woman named Eliza, to William H. Browning, who, *on that day*, sold her to Elizabeth Parks, mother of complainant, and administratrix of Thomas Parks, deceased, his father. That said Elizabeth held said slave as the property of the estate of Thomas Parks until March, 1843, when, in a division of the estate, said negro was allotted to complainant. That on the 22d of July last, she was levied upon and taken into possession by the sheriff of Claiborne county, under color of an execution against said Scott and others, in favor of Wells and Person, for the use of George Morton. A copy of this execution is exhibited with the bill.

That *prior to said 18th April*, 1840, said Wells and Person had obtained two judgments against said Scott, on forthcoming bonds; one for \$359·03, and the other for \$509·30, upon both of which executions had *at that time* been issued and levied upon property sufficient to satisfy them, which property *was not sold by* the officer, *but was released by him*, and said two executions were, on the 20th and 21st of May, 1840, fully paid by Scott. Copies of the said executions and returns are also exhibited with the bill.

That Person (Wells being dead), after the 21st of May, 1840, by proceedings in the Circuit Court of Claiborne county, to which

Parks v. Person, et al.

neither Browning nor Mrs. Parks were parties, and of which they had no notice, caused the return of satisfaction to be set aside and annulled, and has taken out other executions for the same debt, which last executions were also levied upon property of said Scott sufficient to satisfy them. Copies of these executions are made exhibits.

That Person, for the use of Morton, on the 18th July, 1843, caused the execution first referred to, to be levied on the negro Eliza, and threatens to have her sold, and also threatens to have an execution on the other judgment levied on her, unless restrained. That the negro is of peculiar value, and complainant is advised that he will lose his redress against Browning, if he permits her to be sold. Denies that, at the time of the purchase from Scott, he, or any person under whom he claims, had any notice of the lien of said judgments on the negro.

Prayer for injunction, to prevent the sale of the negro, and for general relief.

The answer of Person shows the recovery of the judgments against Scott on the 29th May, 1839, and the forfeiture of the forthcoming bonds on the fourth Monday of November, 1839, and exhibits transcripts accordingly.

States that Wells is dead, that Morton (the usee) has now no interest in the judgments which belong to Person, and that they are unsatisfied except as to \$325, credited on the one for \$359-03.

Admits that Scott owned Eliza, *prior to 18th April, 1840*, and states that he owned her prior to the fourth Monday of November, 1839; admits that he sold her to Browning *prior to 18th April, 1840*, and charges that in fact he sold her to Browning *prior to 20th February, 1840* (the date of the pretended levy), and charges that Browning and Mrs. Parks had full notice of the lien of the judgments, the same being of record.

Denies that the sheriff, even in fact, made any levies by virtue of executions returnable to the May term, 1840; that the entry dated February 20, 1840, purporting to be a levy on *John, Rose, and Eliza*, was made by the sheriff upon the information of Scott, without seeing John or Rose, and without seizing or having any of them in his possession, or under his control. That he ~~saw~~

Parks v. Person, et al.

Eliza, but did not seize her, and that she was at that time in possession of Browning, who had previously purchased her from Scott.

It states, that these pretended levies were released by the sheriff before the return of the writs, and the executions returned "satisfied." That these returns were false, fraudulent, and collusive, and as such were set aside by the Court on motion, and exhibits the orders setting them aside.

It states, that said negro Eliza, named in said pretended levies dated February 20, 1840, is the very same woman now levied on, and claimed by complainant.

Admits that, after the returns of satisfaction were set aside as aforesaid, executions were taken out, and levied on land, which was appraised, and the sale adjourned twelve months under the valuation law; but he states that after the expiration of the adjournment, writs of *venditioni exponas* were issued, and the land sold for \$325, which was applied to the judgment of \$359·03, and due return thereof made before the issuing of the execution now enjoined.

An affidavit of W. G. Renaud, the deputy, sheriff, was filed, and sustains the allegations of the answer, that no levy was in fact made. It states that Eliza, on the 20th of February, 1840, was in Browning's possession, and that he had, previous to that time, purchased her of Scott in payment of an old debt. It also states that the Eliza then attempted to be levied on, is the same negro now in controversy in this cause.

The case was submitted on motion to dissolve the injunction upon the bill, answer of Person, exhibits, affidavit, &c.

W. M. Randolph, in behalf of the bill.

H. T. Ellet, for defendant Person.

It appears from the papers, that at May term, 1839, of Claiborne Circuit Court, Wells and Person recovered two judgments against John M. Scott, *et al.*, one for \$509·86, and the other for \$359·03, both of which were bonded, and the bonds forfeited on the fourth Monday of November, 1839. The bill states that *prior to the 18th April, 1840*, J. M. Scott sold the negro Eliza to W. H. Browning, and that *prior to said 18th of April, 1840*, the

executions on said forfeited bonds, had been levied on property sufficient to satisfy them, and that the property thus levied on was afterwards released by the sheriff before the return of the executions ; and the executions returned *satisfied* to May term, 1840.

Upon these allegations the point is made by complainant, who claims under Browning, that Browning purchased the negro in controversy, free from the lien of the judgments of Wells and Person. This position is denied.

It is undoubtedly settled, that where the sheriff has taken the defendant's goods, *to the amount of the sum directed to be levied*, the defendant is discharged. 2 Tidd's Pr. 1059 ; 2 Ld. Raymd. 1072 ; 1 Salk. 322 ; Bac. Abr. Execution D. ; 3 Howard, 417 ; 12 Johns. 207.

And the sheriff must *return the value of the goods, &c., taken.* 2 Tidd's Pr. 1058 ; 1 Sellon's Pr. 530.

This is, however, a mere *quasi* satisfaction, technical and fictitious in its character. The defendant may avail himself of it, but it is no satisfaction as regards *third persons.* 3 Howard, 417.

If goods are seized on a *f. fa. sufficient to satisfy it*, the defendant is discharged, though the sheriff waste the goods, or misapply the money. 4 Mass. R. 403.

Indeed, all the authorities show that the levy must be sufficient to satisfy the execution, and that fact must be returned by the sheriff.

It is also settled, that if the plaintiff releases the levy, it discharges the debt, but if the sheriff releases it, and restores the property to the defendant, it is no satisfaction.

In the present case the sheriff did not return the *value*, but simply made a general levy ; see exhibits B and C ; and the bill itself alleges that before the return of the writ, the *sheriff released the levy*, and satisfied the executions. Up to the time of the actual return of the writ, the proceedings of the sheriff were *in fieri*, and nothing is conclusive but the return itself.

But if the levy does have the effect to discharge, for the time being, all the other property of the defendant from the operation of the judgment lien, it will follow that the sheriff must in all cases be answerable for the sufficiency of the levy. "He cannot make

Parks v. Person, et al.

a second levy," is the language of the cases; 12 Johns. 207; 2 Tidd 1050. But this is not so; for though Lord Holt, in *Clerke v. Withers*, 2 Ld. Raym. 1072, held the sheriff bound by his return of value, such is not the law. It is no estoppel, but the sheriff may sell the goods for less, and the judgment, even against the original defendant, is not considered satisfied any further than the amount of the proceeds of the sale. 1 Sellon's Pr. 529; Cro. Eliz. 598; Cro. Jac. 515; *Denton v. Livingston*, 9 Johns. 96.

It would happen, therefore, in case a sheriff should make an inadequate levy, and the defendant, pending the levy, should sell the residue of his property, that the plaintiff, without any fault of his own, might lose his whole debt, notwithstanding his judgment is a lien upon all the property of the defendant.

This consequence might follow in England, New York, and elsewhere, where the judgment is not a lien on the goods. There it is the *execution* alone that binds the property, and it binds nothing but what is levied upon and inventoried on or before the return day. All the rest of defendant's property is exempt, and purchasers may buy with safety. 17 Johns. 274.

These principles, however, cannot apply in this State, where the judgment itself constitutes a general and permanent lien on all the property of the defendant, and which must subsist until *actual* satisfaction, unless destroyed by the act of the party. If an execution upon the elder judgment is levied upon property which the sheriff thinks will probably satisfy it, can it be that a younger execution can come in and sweep away all the residue of the property, or that the defendant can sell it off, put the money in his pocket, and set his creditors at defiance?

But, secondly. Browning, at the time of his purchase of the negro Eliza, had full notice, from the records, of the lien of the plaintiff's two judgments upon her. The bill alleges that he purchased her *some time prior to the 18th April, 1840*, without showing *when*, and that the executions were levied *prior to said 18th April*. It appears that the levy is dated *February 20, 1840*, but there is no allegation that Browning purchased *after that date*. The complainant's own showing is therefore defective in its most material

Parks v. Person, et al.

point, and it is difficult to escape the conviction that the bill is so drawn on purpose. The answer alleges that, in fact, Browning purchased *prior to the 20th February*, before there was any pretence of a levy ; and the affidavit of W. G. Renaud, the deputy sheriff (submitted on this motion), proves the fact conclusively, and completely destroys every vestige of complainant's equity.

But if the purchase had been subsequent to the levy, still the levy was not of record in the clerk's office, until the *fourth Monday of May*, the return day, more than a month after the 18th of April. The law can recognize no resort for information but the clerk's office. Parties are chargeable with notice of what appears there of record, and they cannot change their rights or liabilities by inquiries of the sheriff, or of third persons. Suppose the sheriff had told Browning that he had received the money on the executions, would that have destroyed the plaintiff's lien, in case the information was false ?

In fact this levy never became of record, at all, for the bill alleges that the sheriff released it, and it appears that he afterwards returned the executions "*satisfied*."

If the levy had been of record, and had been consulted by Browning before he bought the negro, it would not justify any inference that the plaintiff's judgments were satisfied. It has been shown already that a *seizure to the value* must be *returned by the sheriff*, to warrant this technical inference ; that such an inference is only drawn in favor of the *defendant himself*, and that it only prevails until a sale of the property, and then only for the amount of the sale. But here is no return of the value, nor of any fact from which the value could be estimated. Private opinion cannot be made to defeat the public records. The property might be subject to older incumbrances, or not liable to the executions at all. Indeed, all the information the levy could have given, is, that a proceeding had been had which *might possibly result* in the satisfaction of the judgments.

The release of the levy by the sheriff was "not in the course of his official duty," was improper and unauthorized, and cannot prejudice the rights of the plaintiffs. 9 Johns. 263 ; 1 Cowen, 46 ; 4 ib. 553 ; 6 ib. 465.

Parks v. Person, et al.

The answer denies that any levy ever was in fact made, and the deposition of the deputy sheriff fully proves that the negroes John, Rose, and Eliza never were seen or seized by the sheriff, or brought into his possession, or under his control, without which the levy is void.

But if the levy were good in every respect, still the complainant must fail, because the answer states, and the deposition of the deputy sheriff proves, that the negro Eliza, named in the levy, is the very same negro purchased by Browning, and now in controversy. It certainly cannot be pretended that a levy on property discharges that very property from the lien of the judgment, so that purchasers may buy with impunity.

It is true, the sheriff returned these executions to May term, 1840, satisfied; but the returns were false, fraudulent, and collusive, and, as such, were set aside by the Court (see defendant's exhibit 2). Mrs. Parks was not a party to the executions, nor interested in them, and was not entitled to notice of the motion. Browning's purchase was made before the returns, and was not affected by them.

The bill alleges that subsequent executions are levied on property sufficient to satisfy them, but it appears from the answer, and exhibits No. 3 and 4, that the property levied on was sold for \$325, and the levies entirely disposed of, before the execution now enjoined was issued.

It is therefore submitted that the injunction ought to be dissolved, and an order made directing the negro to be restored to the sheriff for sale under the execution.

CHANCELLOR. The substance of this case is this. Scott, who was originally the owner of a negro woman slave, named Eliza, the subject of the present controversy, sold her to Browning, who, in turn sold her to E. Parks, the mother of the complainant, and administratrix of the estate of her deceased father; E. Parks purchased the negro on account of the estate, and the complainant, as one of the distributees of her deceased father, claims title to the woman, who was allotted to her in the distribution of the estate.

Parks v. Person, et al.

It seems that when Scott sold the woman to Browning, there was a judgment in favor of Person and Wells, against Scott, upon which an execution was then in the hands of the sheriff, which was levied upon three negroes of Scott, the levy afterwards released, and the execution returned satisfied by the sheriff. The levy, the release, and the return, all took place after Scott's sale to Browning.

At a term of the Circuit Court, to which the execution was returned, subsequently held, the return of satisfaction was vacated upon the ground that it was a false return, and that, in fact, no satisfaction had been made. Another execution issued, was levied on the negro woman Eliza, and the injunction was granted in this case, at the instance of the complainant, to stay the sale.

I should have no difficulty in decreeing a perpetual injunction in this case, notwithstanding the false return, if the record in the Circuit Court had disclosed to the complainant, or to the person from whom she derives her title, that state of things which afterwards existed.

If when Browning purchased, the execution then in the sheriff's hands had been previously returned as levied, that levy released and a satisfaction entered, even though all the returns were false, I could have no hesitation in saying, that the lien of the judgment in favor of Person and Wells would have been so extinguished, that the property sold would not have been affected by it.

But these entries were made afterwards, and cannot affect, as they were false, a purchase made prior to their existence. The complainant bought subject to the lien of the judgment; that lien has not been legally extinguished; and if this were the only ground for obtaining the injunction, I should dissolve it.

But there is another point entitled to weight. It is this. The return of the sheriff is *prima facie* evidence of satisfaction, and standing alone must be taken to be true; the record of the case in the Circuit Court does not show any notice that the motion would be there made, to have the return of satisfaction set aside as false, either to the sheriff, the defendant in the execution, or the complainant. So far as the record shows it was purely *ex parte*, at the instance and application of the plaintiff in the judgment at law.

Parks v. Person, et al.

It was wholly irregular to entertain such a motion without notice at least to the defendant in the execution. It was out of the power of the Circuit Court to do so ; the whole proceeding was absolutely void, a mere nullity ; and this Court must protect the complainant from being injured by it.

I strongly incline to the opinion, that where a sheriff's return is sought to be set aside so as to affect the rights of purchasers of property, from the defendant in the execution, and subject it to the lien of the judgment under which the motion is made, notice of the motion must be given to him who holds and claims the property, which may thereby be subjected to the operation and lien of the judgment. I give, however, no opinion on this point.

The motion is overruled.

JUNE TERM, 1842.

JACOB WILCOX, et al. v. WILLIAM MILLS, et al.

A. and B. being indebted in a joint note to C. each executed mortgages upon their respective property to secure the note ; C. filed his bill against both, to foreclose both mortgages ; *held* on demurrer to the bill, that it was not multifarious, and that a decree to foreclose both mortgages could be rendered at the same time.

THE facts of this case sufficiently appear in the brief of counsel, and the opinion of the Court.

• *J. S. Yerger*, and *W. A. Lake*, on behalf of the demurrer. The bill is multifarious. It joins distinct demands against distinct defendants. What interest has M'Dowell in the mortgage of Mills, or in the land and negroes secured by that mortgage ? And, on the other hand, in what is Mills's interest in the land of M'Dowell ? The rights of each to redeem are separate ; their interests are separate ; their mortgages unconnected. If either has any defence to the note secured by the mortgages, he has no interest in exempting the property of the other from the payment of the debt. Their interests are, therefore, adverse ; each party necessarily desiring to force out of the property of the other the full satisfaction of the demand, for which they are both liable. A bill is multifarious when the case of each particular defendant is entirely distinct and separate in its subject-matter, from that of the other defendants. Story, Eq. Pl. 225.

What is the *subject-matter* of controversy here ? the mortgages ; because, without them, the Court could not entertain jurisdiction. That they are distinct and separate, and involve distinct and separate property, of distinct and independent defendants, we have shown. The case, then, is brought within the rule.

W. C. Smedes, for complainants. The bill is filed to foreclose two mortgages, given respectively by the defendants, to secure a joint note, payable to complainants. The bill is in the ordinary form of a bill to foreclose mortgages, except that it embraces both mortgages.

To this bill the defendants have demurred, for multifariousness,

Wilcox, et al. v. Mills, et al.

in joining distinct demands and causes of action against the defendants.

There is nothing in this point. A party has a right, and, in fact, in a court of equity, will be compelled to enforce all his securities for the same debt at once. It is the *unity* of the demand that gives the Court jurisdiction. The demands are not distinct, nor are the causes of action. The makers of a *joint note*, respectively mortgage to secure its payment. The objects of the mortgages are the same. The debt, and the nature of the security, give the Court jurisdiction ; and that jurisdiction necessarily embraces both mortgages. Upon principle, the point is plain. The demurrer is manifestly intended for delay. Suppose these mortgages had been both embraced in *one*, and the land lay in the same county, yet owned separately ; would not the Chancellor have sustained a demurrer to a bill attempting to foreclose only one, and not making the others, parties ? Clearly he would, for the purpose of having all the parties in interest before the Court, and in order to compel the complainants to proceed against that property first, which the relations of the defendants (to enable contribution, &c.,) and the equity of the case demanded.

It is said the bill is multifarious because the case is distinct in its *subject-matter*, as to the different defendants. What is the " subject-matter " of the suit ? The debt. That is the subject-matter. The mortgages are *mere* securities for the payment of that subject-matter. It is true, the mortgages are essential to give this Court, from its peculiar organization, and the principles which regulate it, jurisdiction ; but that jurisdiction being once obtained, the object of the controversy is to get the *debt* paid. If either defendant will pay the debt, it discharges both mortgages. That is all the complainants seek.

The true rule on the subject of multifariousness is laid down by Story, Eq. Pleadings, 224, § 271, to be this. " The improperly joining in one bill, *distinct and independent matters*, and thereby confounding them ; as, for example, the uniting in one bill several matters, perfectly distinct and unconnected, against one defendant, or the demand of *several matters of a distinct and independent nature* against several defendants in the same bill."

If the bill sought to enforce different debts ; if the mortgages

Wilcox, et al. v. Mills, et al.

were made to secure different liabilities, then the bill would be liable to the objection laid down by Lord Eldon, in *Saxton v. Davis*, 18 Ves. 80, where he decides, that "to enforce different demands against persons liable respectively, *but not as connected with each other, is clearly multifarious.*"

An authority in point, in principle, and nearly so in the facts, is to be found in the case of *Thomas Bridgen v. James Carhartt, et al.*, 1 Hopkins's Chancery Reports, 234, wherein Chancellor Sandford delivered the opinion of the court. The complainant held two mortgages against the defendant, Carhartt, upon two distinct tracts of land, to secure two distinct debts, which had been originally contracted to different persons, and assigned to the complainant. The court granted a decree in the case, foreclosing both mortgages. In that case there was one defendant and two mortgages, to secure two different, separate, distinct, and independent debts, and the bill was upheld. Here it is the same debt, and separate mortgages.

I can find nothing in the books to militate against the validity of the bill.

CHANCELLOR. William Mills and James R. M'Dowell, being jointly indebted to Wilcox, Anderson, & Co., in several sums of money, executed respectively mortgages to secure the payment thereof, the mortgage of Mills being upon land and negroes in Warren county, and the mortgage of M'Dowell upon a tract of land in Carroll county.

One of the notes secured by these mortgages having matured, the complainants filed a bill to foreclose both the mortgages, making Mills and M'Dowell defendants to the bill, and praying that the land and negroes of Mills, and the land of M'Dowell, might be sold to pay the debt.

Mills and M'Dowell demur to the bill, for multifariousness in the joinder of distinct demands and causes of action against the defendants.

The demurrer must be overruled. The mortgages were made to secure the same debt. It is true, the mortgages are separate, but the debt is joint, and is a simple obligation of both the defendants. The mortgages are but incidents to the debt. If that is discharged,

Wilcox, et al. v. Mills, et al.

they are necessarily discharged, while that exists, they can be enforced. It is the debt and mortgages that give the Court jurisdiction, and neither alone. If both mortgages had not been joined in the bill, the defendants could have compelled it. I could not permit the complainants, by two separate bills of foreclosure, to coerce the payment of a joint note, when they could effect the same object by a single bill. If, then, at the instance of the defendants, I would have compelled a union of the two mortgages in the same bill, with what propriety can that union be the source of objection?

I see nothing in it. A complainant coming into equity must present his whole case. That has been done in this instance. The demurrer must be overruled, and the defendants allowed ten days in which to answer.

DECEMBER TERM, 1843.

JACOB GUISE v. JOHN MIDDLETON.

Where a decree of sale of property is made, it is generally left to counsel to designate the length of time and mode of publication of the sale ; the Court taking care that the notice is reasonable and fair.

A decree cannot be amended after it is enrolled in a matter of materiality, unless the record exhibits something to amend by ; a mere clerical mistake, or miscalculation, may be amended at any time, when the mistake is apparent on the face of the decree or record.

Where decree by mistake, required certain property to be advertised for *six months* for sale, when it was intended to be advertised for only *six weeks*, and the decree had been enrolled, the Court refused to amend it.

UPON motion to amend the decree made in this case :

W. Yerger, for motion.

The amendment desired, is to obtain a change in the length of time required by the decree for the publication of the property. The decree is an ordinary one for the sale of mortgaged premises, and counsel, in drafting the decree, (it was not drawn up by myself,) by inadvertence, inserted *six months*, instead of *six weeks*, the usual period. The mistake was not detected until after the decree was signed by your Honor. I have no interest in the case, and make the application at the request of Mr. Stewart, who is the counsel of record.

By the Chancellor. Has the decree been enrolled ?

Clerk. It has, sir.

CHANCELLOR. I have been in the habit of allowing counsel to designate the length of publication in decrees of this sort, without prescribing any limit, except to see that the notice be reasonable and fair. It is a matter in which the parties in interest have been left to their own discretion, except that the Court will not permit injustice to be done.

But, unless the minutes of the Court show something to correct

Guise v. Middleton.

the decree by, or the law affixes a positive limitation, the decree, after it has been enrolled, cannot be altered.

The rule is this : That any mere misprision of the clerk, or error in the calculation of principal or interest, apparent upon the face of the decree or record, the Court will order, as a matter of course, to be amended, after enrolment, or even after the term has elapsed. Such errors must be corrected, to preserve the consistency of the records, by which they must be regulated. Any error, not apparent of record, cannot be amended after enrollment.

The Court cannot, therefore, in a matter so material as the length of time for which the property must be advertised, where the minutes show nothing whatever to amend by, order the correction. Had I been prescribing, myself, the proper time for the publication to continue, I should probably not have exceeded one sixth the period now required by the decree ; but I have allowed counsel a discretion ; they have exercised it, it may be, improvidently ; but I cannot now alter it.

Let the motion be overruled.

JANUARY TERM, 1844.

ANGUS M'INTYRE, v. LEDYARD, HATTER, & CO.

Exceptions to the opinion of the Chancellor, on the trial of an issue before him, excluding or admitting testimony, must be taken at the time and entered upon the minutes. Oral evidence will not in any case be admitted on the trial of an issue in this Court; not even to prove the incompetency, show the interest, or attack the credibility, of the witness.

An administrator, who is also the son of his intestate, is not a competent witness, to prove that his intestate did not execute a note, upon which it was attempted to render him liable.

An administrator, who revives a suit of a deceased complainant is not a competent witness, on behalf of his intestate, because he is liable for costs.

AN issue was ordered by the Chancellor to ascertain a question of fact, about which the testimony was conflicting. It is only necessary to notice such parts of the evidence and pleadings as tend to elucidate the points of practice decided in the case; the merits of the controversy not now coming under review.

The bill was filed by Archibald M'Intyre, in his lifetime, to enjoin the levy of an execution, in favor of the defendants, Ledyard, Hatter, & Co.; upon the ground that he had not made the promissory note upon which the judgment in their favor had been rendered; that no process in the suit at law had ever been served upon him, and that he had not executed and delivered the forthcoming bond, upon which the execution sought to be enjoined, purported to have issued.

Archibald M'Intyre died, pending the suit; and his son, Angus M'Intyre, having administered upon the estate, revived the action in his name. His deposition, after he had taken out letters of administration, and revived the suit, was taken, to be read on behalf of the complainant; upon the trial of the issue, the deposition was rejected by the Chancellor.

An attempt was then made, by counsel for the defendants, to introduce oral proof, that sundry witnesses, who had testified in the cause on the part of the complainant, were not worthy of being

M'Intyre *v.* Ledyard, Hatter, & Co.

believed upon their oaths ; and that three of them, who had testified that they were members of the family of Archibald M'Intyre, were, in point of fact, his daughters ; and therefore, on the ground of interest, disqualified to give testimony in the case ; the Chancellor, however, refused to permit the testimony to be introduced.

Judge *Clifton*, for the defendants.

It is desired, on the part of the defendants, to reserve several questions, which your Honor has decided against us ; is it the practice of the Court, upon the trials of issues before it, to entertain bills of exception to the opinion of your Honor ?

By the **CHANCELLOR**. The practice in such cases is, to note the exception taken to the deposition, at the time when the deposition is offered, and have it entered upon the minutes of the Court, in which event, the objection is reserved for the final hearing of the case ; when, if convinced of any error in my decision, of sufficient importance to affect the finding of the jury, it will be set aside, and a new issue awarded ; or, I would proceed to decide the case myself. Should I find no error in my opinion, the party feeling himself aggrieved would then have the benefit of the exception, upon an appeal.

On behalf of the complainants, Messrs. *Hutchinson* and *Foote* argued the questions of law, upon excluding the depositions of Angus M'Intyre, and the oral proof offered.

Messrs. *Mayes* and *Clifton*, for the defendants.

The **CHANCELLOR** made the following decision : I cannot hesitate about excluding the deposition of Angus M'Intyre. He is a party to the record, as administrator to the original complainant, who has died since the institution of the suit. If this case should be decided against him, and in every case where an administrator is a party, there is the possibility of that contingency, unless this Court will certify "*that there were probable grounds for instituting, prosecuting, or defending the action,*" as the statute requires, the administrator will be directly liable for costs. He is, of course, then, interested, at least to the extent of the costs, in the case, and his testimony would, in law, necessarily be affected by that direct

M'Intyre v. Ledyard, Hatter, & Co.

and immediate interest, and would, on that account alone, have to be excluded.

But the other ground is also well taken. He is the son of his intestate ; if, by his testimony, he succeeds in discharging his ancestor from the debt, with which it is sought to charge him, he swells his own distributive portion of the intestate's estate, and reaps the reward of, perhaps, his own iniquity. Such temptation to the commission of perjury, can never be held out by this Court ; an interest so direct and palpable, so full of inducement to sway the integrity of the witness from the path of truth, must forever exclude him.

With reference to the admission of the oral testimony, to prove the relationship of the female witnesses to the complainant's intestate, and to attack their credibility, I am equally clear. It cannot be admitted, without a violation of well settled rules of equitable practice.

Depositions, to be admitted upon the trial, either of an issue, or in chief, must be *in writing*, taken upon notice to the opposite party, after a strict compliance with the prescribed rules on that subject. To establish a different practice, would be the introduction of endless confusion, and work the greatest injustice. That this is so, will be at once apparent from the consideration of the application in this case. It is proposed, for the first time, to impeach, by the introduction of oral proof, the character of the witnesses, whose testimony taken upon due notice, and in due form, has been filed in the case. The parties to this controversy, and the witnesses, all live in a distant county. To permit such a question to be sprung upon them here, away from the means, perhaps, of sustaining their credibility, or at least combatting and counteracting by other evidence, the proof now attempted to be introduced, ignorant of the intended attack, without notice and without preparation, would be to countenance, what it is apparent, at the first blush, would work the greatest injustice. Especially when it is taken into consideration, that the party now offering to introduce this proof, had the fullest opportunity, in the usual mode, of accomplishing his end. These very witnesses, when under examination, might have been asked one of the questions it is proposed to propound to the witness, in open Court.

M'Intyre v. Ledyard, Hatter, & Co.

The more I reflect upon the propriety of the rule, the more I am satisfied that it should be inflexible.

Had these objections appeared of record, if they exist at all, I should not hesitate to exclude the depositions : as it is, however, they must be admitted.

DECEMBER TERM, 1843.

HENRY S. FOOTE, et al. v. BURR GARLAND, et al.

F. and J. entered into partnership to transact the mercantile business, F. sold out to J., and J. gave F. a bond of indemnity with surety, conditioned to pay all the liabilities of the firm; J. died insolvent, without any legal representative, and leaving the debts unpaid. F. filed a bill against the sureties in the indemnity bond, to compel them to a specific performance of their contract; held, on demurrer to the bill, that the Court could not grant the relief asked, and decree a specific performance of such a contract.

THE bill was filed by Henry S. Foote, and a great many others, as complainants, against Burr Garland, and George N. Hoan, the latter of whom was a non-resident. It averred that Foote, one of the complainants, and Thomas C. Johnson, in the month of September, 1836, formed a mercantile partnership, under the name of T. C. Johnson & Co., to do business in this State. In pursuance whereof, Johnson went on to New York and Philadelphia, and purchased goods of the other complainants, to the amounts set forth in the schedule attached to an assignment, filed with the bill. The goods were brought to Mississippi, and the business commenced in Madisonville. Afterwards, in May, 1837, the partnership was dissolved; the goods on hand, and everything, transferred to Johnson, who agreed to pay all the debts of the concern; and to secure that object, on the 5th of May, 1837, he, with the defendants, Burr Garland and George W. Hoan, his security, entered into a penal bond to complainant, Foote, in the penalty of twenty thousand dollars. To which was attached a condition, reciting the purchase of the goods in New York and Philadelphia, in general terms; the bringing them to Mississippi; the dissolution of the firm; and the agreement that the goods should be delivered to Johnson, as his own property, and that he should be responsible for all the liabilities of said firm, from its origin up to that time; then the condition is, "Now if the said Johnson shall well and truly pay off and satisfy all the debts and liabilities of said firm, *as aforesaid*, either in Philadelphia or New York, or elsewhere, and well and truly save the

Foote, et al. v. Garland, et al.

said Foote harmless from all responsibilities growing out of, or connected with, said firm, then, and in that case, this obligation is to become void and of no effect ; otherwise, to be of full force and validity." The debts in New York and Philadelphia, in part, are unpaid ; about fifty per cent. having been made on an assignment made by Johnson, which was exhibited with the bill. Johnson had departed this life without any representative, leaving nothing. That Hoan was a non-resident. The bill prays that the defendants be compelled specifically to execute the bond, by paying off the debts mentioned in the bill, for account, and for general relief.

A general demurrer, for want of equity or title, to come into the Court, was filed.

Robert Hughes, for the demurrer.

1. The demurrer should be allowed, because the complainant has no right to come into this Court against the defendants.

The defendants are the sureties in an indemnity bond. The principal has not been sued, and this bill is filed, to compel the defendants to a *specific* execution of the contract contained in the bond.

In the case of *Flint v. Brandon*, it is said : " This Court does not, I apprehend, profess to decree a specific performance of contracts of every description. It is only where the legal remedy is inadequate, or defective, that it becomes necessary for courts to interfere." In *Errington v. Aynesley*, Lord Kenyon says, " a specific performance is only decreed, when the party wants the thing in specie ; and cannot have it in any other way." See 8 *Vesey*, 163.

Does the rule, which is here laid down by the Master of the Rolls, apply to this case ? It does, most clearly. He has shown that he wanted the thing in specie ; but has he shown that he cannot get it in any other way ? We think he has not. By the complainant's statement in his bill, the firm of Johnson & Co. were indebted to the amount, and to the persons named in the schedule filed with the bill. Those debts, Johnson had agreed to pay, and to save complainant harmless in reference to them. He had or had not a cause of action in consequence of those debts being and remaining unpaid,

if the condition of the bond was broken ; and an action at law would lie, and the plaintiff, if any thing, would recover the amount of the debt, with which he might pay those debts, and thereby the thing in specie would be obtained.

2. But what right has the complainant to insist that these defendants should be compelled to execute these covenants. The defendants are only securities. They did not agree that they would pay all and save harmless, but only that Johnson should do so ; and, in the event that he did not perform that, the bond should be forfeited, and they would be responsible upon it. In the case of *Waters's Rep.'s v. Riley's Administrator*, 2 Har. & Gill, 305, the Court says : "In the case of a surety, who is bound only by the bond itself, and is not under the same moral obligation to pay, equity will not interfere to charge him beyond his legal liability." As, in this case, the sureties have agreed that Johnson should do the act provided for by the bond, if not done, they, the sureties, were liable in an action for the amount of damages sustained by a breach of this agreement. This is the utmost of their legal liability. Yet, in addition to the engagement of the sureties, it is now sought to add another, by some legerdemain in this Court, which is an engagement which is not in the bond, that the sureties would do the thing. Suppose an agreement for the sale of land, and a bond is given with security, conditioned to complete the title, in the event of the death of the principal obligor : would the Court, on bill filed against the surety, compel a specific execution of the agreement ? We think not ; because the surety had not engaged to perform, but only that the principal should ; but in the event that he did not, that he would pay damages.

3. There was no cause of action at law, or right to bring this suit, because the complainant, by his bill, has shown no breach of condition of the bond.

A distinction is taken in the books between cases where the debts or liabilities provided for by the bond have accrued before, and those which accrue after, the execution of the bond. In the first, no right or cause of action accrues, until action brought against the obligee ; while in the latter, if the debt has accrued, and is

Foote, et al. v. Garland, et al.

unpaid, the action accrues. See *Lewis v. Crocket*, 3 Bibb. 197; *Rudd v. Hanna*, 4 Monroe, 530.

The debts which it is alleged are unpaid, and for the non-payment of which it is said there is a breach of the bond, and upon which it is insisted a cause of action accrued, or a right to bring this suit arose, were all created and had accrued before the giving the bond of indemnity. They were then known to exist, were unpaid, and the complainant, instead of insisting that they should be paid, took a bond for their payment, and to save him harmless. In other words, I know the debts are unpaid, but you have promised to pay them, and I take your promise ; see that I do not suffer ! Has the party sustained any damage, which gives him a right of action ? The leaving the debts unpaid is no breach of the condition of the bond, because that was true at the time the bond was given ; something else, then, must turn up before the bond is forfeited, and this, the courts have said, is the commencement of an action for the debts due and unpaid.

Hubbard, in behalf of the bill.

The defendants have demurred to the bill, and allege, as the principal ground of the demurrer, that complainants have a remedy at law upon the bond to indemnify, and therefore are not entitled to the aid of this Court, to decree a *specific performance* of the condition of the bond, &c.

The rule is too familiar to need reference to authority to sustain it, that a court of equity will refuse its jurisdiction to aid a party, unless his remedy at law is clear, unembarrassed, and adequate.

It is respectfully insisted by the counsel for complainants, that their remedy for a breach of the condition of the indemnity bond, as set forth in this bill, is *not clear, unembarrassed, and adequate at law*.

There are twenty-five different creditors of the firm of Thomas C. Johnson & Co., as set forth in the exhibit (A) to the bill. Suppose the first-named creditor should bring his suit at law against the complainant Foote, who was a member of that firm, to recover the amount of his claim, and obtain his judgment at law. Here

Foote, et al. v. Garland, et al.

would be a breach of the condition of the bond, for which Foote would be entitled to recover damages of the defendants, *pro tanto*.

And suppose the next creditor, in order, then brings his action at law against Foote, and in like manner recovers his debt, and each successive creditor in like manner bring his separate action to recover his claim, there would be twenty-five separate suits ; out of which would arise, by possibility, as many separate causes of action in favor of Foote against the defendants (the obligors) in the bond. Here would be a palpable violation of that familiar legal maxim, that the law abhors multiplicity of suits,— all of which might be, and ought to be, avoided by compelling the defendants to perform the condition of their bonds. And equity, following the same familiar maxim, will interpose its salutary aid to “ prevent multiplicity of suits ” at law. But the stipulations in the bond are, not that the obligors will pay and refund to Foote (the obligee) the amount, with damages, which he may have to pay on account of the debts of the firm of Thomas C. Johnson & Co., but it is, “ that they (the obligors) will pay those debts in the first instance, and save Foote harmless from them,” &c.

This the defendants, by their demurrer, admit they have failed to do.

In *Champion v. Brown*, 6 J. C. R., Chancellor Kent says, “ *There are cases to show that equity will decree the performance of a general covenant of indemnity, though it sounds only in damages, upon the principle on which the Court entertains bills quia timet,* ” and cites 1 Vernon, 189 ; 2 Ch. Cases, 146. See also 2 Story’s Com. 145, 146.

The case of *Ranelaugh v. Hayes*, above referred to in 1 Vernon, 189, is identical in principle with the case at bar, and clearly and fully sustains the position, that this Court will decree the specific performance of covenants to indemnify, although they sound merely in damages ; and the Lord Keeper compares that case to that of a surety, protected by a counter-bond, “ although not troubled or molested for the ‘debts,’ yet, at any time after the debts are payable, this Court will decree the *principal* to discharge the debts ; it being unreasonable that a man should always have such a cloud hanging over him.”

Foote, et al. v. Garland, et al.

In conclusion, it may be urged as an additional reason, why this Court should entertain this bill, that it involves extensive and complicated matters of account, which are peculiarly the subject of equity jurisdiction, all of which may be settled and liquidated between all the parties, under the direction of one and the same decree; which could not be done in a court of law without great expense, unnecessary consumption of time, much embarrassment in the adjustment of all the claims due the respective creditors, and a multiplicity of unnecessary lawsuits.

It is therefore respectfully insisted, by the counsel for complainants, that the demurrer ought to be overruled.

Hughes, in reply.

The difficulty suggested by the counsel in his first position, as to multiplicity of suits, is easily answered; more than one action could not be commenced on the bond of indemnity, but as the first breach took place the forfeiture of the bond would take place, when a suit would be commenced, and a judgment would be rendered for the penalty of the bond, to be discharged by the payment of damages sustained; those damages would then be suggested on the roll, and then a recovery had; and afterwards, as other cases arose, suggestions would be made and damages recovered until the whole penalty recovered. See Revised Code, 117, sec. 55. The other points are sufficiently answered in the brief already made out.

CHANCELLOR. This is a bill to enforce a specific performance of a bond of indemnity, to which there is a general demurrer. I had occasion to examine the precise question here presented, in the late case of *Buckner v. Hamborough, et al.*, 1 Freeman's Chancery Reports, 533, in which I held that no relief could be given in a case like the present. I refer to that case, for the authority upon the question, and as containing a full exposition of my views, applicable to the one before me. Let the demurrer be sustained, and the bill dismissed at the costs of the complainant.

JANUARY TERM, 1844.

LYDIA A. BARROW, et al. v. SAMUEL A. BARROW.

W. B. dies intestate, S. B. administers upon his estate, and leaves the country with the property of W. B. in possession; *held*, that the court of chancery has jurisdiction of a suit by the distributees of W. B. to attach the property of S. B., left in this State, and subject it to the payment of his liability to the estate of W. B., that being clearly ascertained by the pleadings and proof, and it appearing that the ancestor's debts were all paid, and no administration then pending upon the estate.

If the debts were unpaid, or administration *de bonis non* existing, in either case, the bill would have to be filed by the administrator *de bonis non*, to subject the property for the benefit of the creditors, or ascertain the amount of the indebtedness of the first administrator.

THE bill, after reciting the names and residences of the complainants, states that William Barrow, of Madison county, in this State, died intestate, leaving complainants, his widow, and heirs at law; that Lydia A. Barrow, the widow, one of the complainants, and Samuel Barrow, the defendant, one of the sons of William Barrow, deceased, administered upon his estate; that Lydia A. Barrow, being infirm, left the management of the estate to Samuel Barrow, who took possession of the estate in 1838, and kept possession of it until April, 1, 1840, when he suddenly left his family and residence in Madison county, and went to Texas. That at the March term, 1840, of the Probate Court of Madison county, the letters of administration to Samuel Barrow were revoked, and Lydia A. Barrow remained sole administratrix. The bill proceeded to exhibit the indebtedness and liabilities of Samuel Barrow, to the estate of William Barrow, which amounted to \$7,356.29. It exhibited the condition of the estate of their ancestor, and exhibited vouchers of the Probate Court of its settlement, and stated that one of the complainants had conveyed her interest in the realty of William Barrow, deceased, to the defendant Samuel Barrow, who was therefore seised in his own right as an heir of William Barrow, and as purchaser, of two eighths of the real estate described in the bill, as having belonged to the intestate; that the

Barrow, et al. v. Barrow.

defendant had no other property in the United States. The prayer of the bill was, that the interest of the defendant, in the property described, might be subjected to the satisfaction of his indebtedness to the estate of William Barrow, and for other relief.

The case was referred to a commissioner, to ascertain the amount of Samuel Barrow's deficit, who reported an indebtedness of \$6,739.33.

The cause was submitted to the Chancellor upon a *pro confesso*, taken on proof of publication, against the defendant.

Jacob F. Foute, for complainants. This cause is set down and submitted for hearing, on the bill, exhibits, and proofs filed, and the *pro confesso* vs. the defendant, and report of the commissioner, of amount due from defendant.

Complainants ask a decree, upon the following grounds and reasons, amongst many others that might be urged.

1. This Court has concurrent jurisdiction with courts of common law in all matters of account. Blake's Ch. Practice, 17; *Ludlow v. Simond*, 2 Caines, Cases in Error, 1; *Post v. Kimberly* 9 Johns. Rep. 470.

2. Complainants may come into this Court, not only to compel the defendant to account, but also for the sole purpose of having their own account allowed. Blake's Ch. 17; *Ludlow v. Simond*, 2 Caines, Cases in Error, 1.

But the fund being here, and subject to process of this Court, the Chancellor will liquidate complainants' claims, and decree satisfaction. 5 Monroe, 169, *Paul v. Rogers*.

3. This Court has jurisdiction when the remedy at law is doubtful, *incomplete*, or embarrassed, or inadequate. Jeremy's Eq. 554, &c.; Blake's Ch. 17; *Rathbone v. Warren*, 10 Johns. Rep. 587; *Ludlow v. Simond*, 2 Caines, Cases in Error, 1; 1 Bibb. 305, *Buford v. Buford*; 3 Littell, 222; 3 J. J. Marsh. 291; 1 Ves. 204; 4 Inst. 213; 1 Cases in Ch. 232; *Draper v. Crowther*, 2 Vent. 363; 1 Vern. 58; *Scott v. M'Millen*, 1 Littell, 302; 2 Blackford, 358.

4. When this Court has jurisdiction for one purpose, it may retain it generally. Blake's Ch. 18; *Rathbone v. Warren*, 10 Johns.

Barrow, et al. v. Barrow.

Rep. 587 ; 3 Atkyns, 263 ; 2 Atkyns, 363 ; and especially in a case like this, 5 Monroe, 169, *Paul v. Rogers*, Adm. ; 1 Littell, Rep. *Scott v. M'Millen*.

5. The case presented is one of account, which is an original and undeniably ground of equity jurisdiction.

6. The provisions of sec. 1, ch. 16, Rev. Code, 157, for attachments in chancery, embrace complainants' case fully, as we believe.

The first clause of that section provides for one class of cases, where some defendants are without the State, and other defendants are within the State ; the residence of neither class is required to be, or to have been, in the State, at any time. The second clause of the section, provides for another class of cases, in these words. "Or against any such absent defendant, or defendants, having lands or tenements within the State, &c.," which last class embraces complainants' case, and if doubts exist as to this position and construction of the section, it is suggested that the amendatory act of December 9, 1830, ch. 16, (page 20, session acts,) extends the operation of the statute and cases embraced so far and so clearly, as to dispel doubt. See also 2 Blackford's Rep. 358 ; *Kippers v. Glancey*, and cases there referred to.

7. The bill shows that defendant had removed beyond the limits of the United States ; hence, complainants could have no actual service of notice or process, in any suit or proceeding against him, and the complainants could not proceed by common law attachment, because that requires oath to be made of the "amount of the debt, or demand," &c. ; these complainants could not by possibility make that oath, because that amount could not be known, or even reasonably guessed at, until an account was taken and settled by some person or tribunal authorized, or having cognizance of the subject ; this Court alone has cognizance, and can by its powers properly cause the account to be taken, and, having done so, will proceed to give relief in the premises. Moreover, the common law process of attachment is intended only for, and is based upon, "debts or demands," arising upon contracts, agreements, or dealings between the parties, and not such demands or claims as those stated in this bill. And a proceeding by common law

Barrow, et al. v. Barrow.

attachment cannot be had by an executor, or administrator, for a claim or demand due the estate they represent.

8. The defendant, as complainants insist, was a trustee for them, a receiver of the profits of their estate, and in that character this Court is called upon to hold defendant to account, and give them relief, upon the general ground of jurisdiction of this Court over trustees, and to protect them against a great and serious loss, for want of an adequate and complete remedy at law. Jeremy's Eq. 537, 538, 554; 2 Edw. Ch. Rep. 64, 66, 67.

The case presented by complainants' bill, is one in which the Probate Court has neither adequate powers, nor process to relieve, nor is it a case exclusively within the jurisdiction of the Probate Court; and if it were within its jurisdiction, under ordinary circumstances, the impossibility of reaching defendant by any process, or mode of proceeding used in, or allowable by that court, would render it powerless to relieve or protect complainants. Jeremy's Eq. 537, 538, 554; 2 Edw. Ch. Rep. 66, 67; 5 Littell, 49, 50; 1 Littell's Rep., *Scott v. M'Millen*, 305.

Defendant has in fact received, as appears from allegations, proofs, and account taken, the full amount of the value of his share or portion, as distributee of said William Barrow's estate, or perhaps more, and this large amount received by him cannot be set off, against him, or his assignee, &c., by the other distributees, or the administratrix, in any proceeding or suit that might be instituted by said defendant or his assignee, for his interest in, and for distribution of, said estate; and defendant, a resident citizen of another republic, having nothing in this but his interest in said estate, and beyond the reach of our laws, would recover two eighths interest in said lands, and one eighth of said slaves, and of other personal property, and dispose of it, leaving complainants wholly remediless, unless this Court now interpose and relieve them.

2 Blackford's Rep. 129; Ib. 358, *Kipper v. Glancey*.

The complainant Lydia A., as widow, is interested to the amount of one eighth of the personal estate of William Barrow, deceased, and also to the extent of her dower interest in the rents and profits of the lands received by defendant, as trustee or receiver; and the co-complainants are interested and entitled to their shares of the rents and pro-

Barrow, et al. v. Barrow.

ducts of the lands, received by the defendant ; then all the complainants are creditors of defendant, considered as trustee, and claim out of the same subject-matter, and in the same right, as jointly interested in the same fund : hence we conceive they are properly joined in this bill.

But if mistaken, in foregoing positions, we insist that Lydia A. Barrow is to be considered as the security of Samuel Barrow, in his administration bond ; and that, as such security, she is entitled to be indemnified out of the interest of Samuel Barrow, in the estate of William Barrow, deceased, now in her hands, as sole administratrix, against her liabilities as such security.

The *devastatio* of Samuel Barrow, we think, is clearly made out by the bill, proofs, exhibits, and commissioners' report ; and that he has wasted and misapplied the assets which came to his hands is fully shown ; and for all this, all the parties, on the administrator's bond, are liable ; and if so, have not these parties a right to be indemnified ? But their principal is beyond the limits of the United States ; beyond the reach of any legal process on his person. How, then, can this indemnity be secured and enforced, unless by this Court ? Securities are favorites in this Court, in the language of some jurists ; and to relieve them, is one of the most ancient, and useful, and unquestionable grounds, of equity jurisdiction.

We admit the bill does not show that Mrs. Lydia A. Barrow or other persons on the administration bond, are sued or recovery had by them ; but we insist it is not necessary she and the other securities should wait to be sued. This Court has now before it the evidence of the liability of their principal, Samuel Barrow, administrator ; and upon policy, and to prevent multiplicity of suits and circuity of action, as well as upon adjudged principles, should relieve. See *Ranelaugh v. Hayes*, 1 Vernon, Ch. Rep. 190 ; *Theobald on Principal and Surety*, p. 227, sec. 245, 246.

But suppose there be no creditors to complain of the waste of assets by Samuel Barrow, then the distributees of the estate of William Barrow, deceased, are the only parties injured by such waste ; and who can complain ? They are complainants now before the Court : have shown their rights and amount of claims. No proceeding they could adopt in probate court, or courts of common

Barrow, et al. v. Barrow.

law, could enable them legally to establish a *devastatit* in Samuel Barrow, or to subject his person or estate to their demands, because inconsistent with their modes of proceeding; hence, they are without remedy or relief, either against Samuel Barrow, administrator, or his sureties, unless this Court will relieve them. Upon the various grounds stated, complainants ask a final decree, and such relief as may be consistent with their case.

CHANCELLOR. This was a bill filed by the distributees of William Barrow, deceased, against Samuel Barrow, administrator. It is alleged in the bill, that the defendant received into his possession a large amount of the property of the intestate, and left this country with that property in possession, and fled to Texas.

The complainants state specifically, and prove, what property he took away with him, and exhibit its value ; they also state and prove that all the debts of their ancestor were paid and discharged, and that no administration on the estate now exists. Thus removing a technical objection, that might otherwise have been urged against and defeated the bill ; that is, that an administrator *de bonis non*, should have qualified, and exhibited the bill in his own name as complainant, to subject the defendant's property for the benefit of creditors, and ascertain distinctly the amount of indebtedness of the first administrator.

Freed from this objection, by its own allegations, which by the *pro confesso* and proof are fully established, the bill is a mere foreign creditor's attaching bill, to subject lands of the defendant out of this State, in the possession of defendants within the State, to the indebtedness of non-resident complainants.

A decree is therefore ordered, to be framed according to the statute.

Fisher, et al. v. Grimes.

DECEMBER TERM, 1843.

**GEORGE FISHER, et al. ADMINISTRATORS OF JESSE S. BROWN
(DECEASED) v. BENJAMIN GRIMES.**

F. and others, administrators of B., sold the real estate of B. to E., and filed their bill to foreclose the statutory lien, for the purchase-money. B.'s wife had dower allotted to her, in the lands, and sold her right of dower to E., who dies : E.'s widow resists the application to foreclose the statutory lien, and claims dower in the dower right purchased by E.; *held*, that the purchase of E., of the dower right of B.'s widow, accrued to the benefit of the administrators, and that E.'s widow was not entitled to dower in the premises.

A wife is dowable only of an estate of inheritance. A mere life estate is not the subject of dower.

THE bill was filed by Fishet Beverly, R. Grayson, and Nancy Brown, administrators and administratrix, *cum testamento annexo*, of Jesse S. Brown, deceased, and alleged that their testator was seised of lands in his lifetime, which, by order of Court, they had sold to Burwell T. Edrington, who gave his note, with sureties for the purchase-money, and they conveyed the land by deed to Edrington; that Edrington died, leaving a widow and two children; that, before his death, he sold the lands in controversy to the defendants then in possession, who had full notice of the statutory lien, which the complainants pray may be enforced.

Mrs. Edrington answered the bill; she stated that the widow of Jesse S. Brown had conveyed her right of dower, in the land sold, to Mr. Edrington; that, as the widow of Mr. Edrington, she had claimed, and the Probate Court of Yazoo county had allotted to her, dower of one third of the dower right in the lands of Mrs. Brown, which she claimed to hold exempt from the mortgage, and prayed that her interests might be protected. The other defendant made no answer.

Wilkinson and Miles, for complainants.

This is a bill filed to foreclose the administrators' lien for the purchase-money. There is no controversy about the facts. The

Fisher, et al. v. Grimes.

land was sold, the note given for the purchase-money unpaid ; and a sale of the same land, in payment of the note, is all that is asked.

There is nothing in the defence of Mrs. Edrington : the purchase by her husband was but the life estate of Mrs. Brown ; an interest not subject to dower.

R. S. Holt, for defendant Edrington.

The facts in the case fully proven, show an unquestionable right in Mrs. Edrington to that portion of the land in controversy which was assigned her, during the joint lives of herself and Mrs. Brown. She, as to this, is clothed with the rights of Mrs. Brown, which were superior to the claims of the personal representatives of Jesse S. Brown.

As to the land, therefore, assigned to Mrs. Edrington, the Court can only decree the sale of the residuary interest after the termination of her estate. To obtain this protection of her interest, is the object of her answer.

CHANCELLOR. This bill is filed, by the administrator of Jesse S. Brown, to foreclose the statutory mortgage, given by our laws, on a tract of land, sold by him under an order of the Probate Court of Yazoo county. It appears that Edrington, who became the purchaser at that sale, has since died, and the land was again sold, as his property ; at which sale the present holders became purchasers, with full notice of the prior lien in favor of the complainants. It also appears that Mrs. Brown, the widow of Jesse S. Brown, claimed and had allotted to her dower in the land thus sold, and that Edrington afterwards purchased her dower right therein. Upon the death of Edrington, his widow claimed and had allotted her one third of the dower right so purchased by her husband from Mrs. Brown, and she now claims to have that right protected, under any decree that may be made in this case. It is clear that, by the purchase of the right of dower from Mrs. Brown, Edrington became thereby clothed with a vested fee simple title to the entire tract of land, and his whole estate in it became thereby subject to the operation of the statutory mortgage. Here was a union of the life estate and the estate in remainder, in the same person—thus the

former became completely merged in the latter. I take it to be well settled, that a purchase by a mortgagor of an outstanding title to the land, will enure to the benefit of the mortgagee. The widow would, perhaps, be entitled to dower in the equity of redemption of her husband, upon paying a ratable proportion of the money due on the mortgage. But this she does not ask. She asks to be endowed of the life estate her husband purchased in the land, after the statutory mortgage took effect. I have already shown that this life estate became merged in the fee, and was thus made subject to the mortgage. But if it were possible to consider a life estate separate from the remainder, after they were both united in the same person, still it is evident that the widow could have no claim to dower in the life estate. The wife is dowable only, at common law, out of an estate of inheritance, of which the husband was seised, either at his death or during coverture ; and our statute has made no change in this particular. A mere life estate is not the subject of dower. Both the freehold and the inheritance must unite in the husband, in order to entitle the wife to dower. 4 Kent's Com. 39. I am of opinion that the complainants are entitled to foreclose the mortgage against the claim set up to dower.

Let a reference be made, to ascertain the amount due on the purchase.

110 SUPERIOR COURT OF CHANCERY.

Com'rs of Sinking Fund *v.* Patrick, et al.

DECEMBER TERM, 1843.

COMMISSIONERS OF THE SINKING FUND *v.* R. A. PATRICK, et al.

A party having a valid defence to a portion of the amount of a judgment at law against him, cannot have an injunction for the whole amount of the judgment.

A. having made a payment upon a note, which is credited upon the back of it, being sued at law upon the note, permits judgment to be rendered against him for the whole amount of the note, without pleading payment, or calling the attention of court and jury to the credit on the back of the note, is not entitled to relief in a court of equity.

A party having a valid legal defence, which by gross negligence he failed to make at law, cannot be heard to make it in a court of equity.

THIS case was submitted to the Chancellor, upon a motion to dissolve the injunction granted in the case, by one of the circuit judges ; the motion was based upon the want of equity on the face of the bill.

Potter, for motion.

W. Yerger, contra.

CHANCELLOR. The Commissioners of the Sinking Fund obtained a judgment at law against the complainant, Patrick, and his sureties, upon a note made in the year 1838, for the sum of \$4,500·00, bearing ten per cent. interest, being, as expressed on the face of the note, for a loan of money. On the 6th of July, 1839, the sum of \$462·25, was paid, being all the interest then due, and the payment was credited upon the back of the note.

On the 22d of December, A. D. 1842, judgment was obtained in the Circuit Court of Hinds county, upon the note, for the sum of \$6,652·52, and costs of suit, being the principal and interest due upon the note, on the day the judgment was rendered.

All the allegations of the bill, for the purpose of obtaining the injunction in this cause, restraining the plaintiffs in the judgment from collecting any part of it, are, that the complainants had, on the day stated above, paid the sum of \$462, the interest then due, and that they had not been allowed the credit.

And yet a circuit judge was found, who enjoined the collection of

Com'r's of Sinking Fund v. Patrick, et al.

\$6,652·52, because the complainants had not been allowed a credit of \$462, to which they averred they were entitled.

There was not a shadow of a pretext for this injunction for the whole amount of the judgment; and I think none even for the \$462·25.

In looking into the record of the judgment at law, I find the only issue presented to the jury, was one of *non assumpsit*; there was no plea of payment or off-set. I have not entered into a calculation to ascertain whether or not, in point of fact, this \$462 was credited upon the note and allowed before the judgment was taken. Such an inquiry is not necessary.

To entitle him to have made the defence at law, he was bound to have plead the payment, or called the attention of the court and jury to it, if credited on the back of the note, under the issue then before the jury. He did not do so, and he shall not be permitted to make it here.

He shows a degree of gross negligence that shuts the doors of this Court to his entrance here, and excludes him from being heard upon the subject. He made no defence at law; he might have done so. I cannot allow him to renew and protract a controversy here, which he might and should have settled there.

Let the injunction be dissolved.

DECEMBER TERM, 1843.

DAVID S. STACY, ADMINISTRATOR OF CHARLES S. LEE
(DECEASED) v. SAMUEL BARKER, et al.

In a bill filed to foreclose a mortgage, upon property which has passed by sale from the mortgagor into the possession of third persons, it is not necessary to allege, in the bill, that the persons in possession had notice of the mortgage.

That a party is a *bona fide* purchaser without notice is purely a matter of defence, and must be set up by the party who would avail himself of it, whether notice be charged or not.

Where a bill is filed to enforce a mortgage on property in the hands of persons in possession of the property, by title derived from the mortgagor, the allegation that they hold by "*a pretended purchase*," is equivalent to a charge of notice of the mortgage.

Where property at a probate sale is sold in Louisiana, as the property of the succession and the community of the deceased husband and of his wife, and a mortgage is taken to secure the purchase-money; in a bill filed by the administrator of the husband in Mississippi, to foreclose the mortgage, on the property which has been removed into Mississippi, the wife of the intestate is a proper party.

THE complainant, administrator of Charles S. Lee, residing in Louisiana, alleges that Lee departed this life in Mississippi, in 1836, leaving a large estate of movables and immovables in Louisiana, as also some estate in Mississippi. That on the 23d July, 1840, complainant was appointed administrator of said Lee, by the Probate Court of Concordia, in Louisiana, and qualified and took the oaths, &c.; and that at the March term, 1841, of the Probate Court of Adams county, Mississippi, he was duly appointed administrator in this State. Complainant alleges that, prior to the grant of letters of administration to him as aforesaid, a sale of a certain portion of said estate was made on the 29th March, 1837, by virtue of an order of the Parish Court of Concordia; that in said order, said estate was described as belonging to the succession of the said Charles S. Lee, deceased, and to the community theretofore existing between him and his wife, Mrs. Ann Lee, residing in said parish; that at said sale, the negroes, Ephraim, Myers, Peter, Jones, Jim, Harrison, David, Washington, Oscar, Charles, and Jerry, Kendrick, were purchased by Samuel Barker, on the terms made known at said sale, and referred to hereafter, at the following prices: Ephraim,

Tacy v. Barker, et al.

\$1500; Peter, \$1960; Jim, \$1625; David, \$1125; Washington, \$1785; Oscar, \$1915; Charles, \$1645; Jerry Kendrick, \$625, amounting in all to \$12,180. That said sale was made on the following terms: "7 per cent. of the amount of the purchase-money, cash on the day of sale—the balance in four equal annual instalments; the purchasers to give their promissory notes with at least two approved indorsers, and a special mortgage reserved upon the slaves until final payment; all of said notes to be payable at the office of the Judge of the Parish of Concordia, and to bear interest at 10 per cent. per annum after maturity; it being understood, however, that the payment of 10 per cent. is not to give the purchasers the right of delaying payment after maturity—one fourth to be payable in one year, another in two years, another in three years, and another in four years, from the date of sale."

That Barker was present at the sale and paid 7 per cent. on his purchase, and executed his four promissory notes, payable one, two, three, and four years after date, each for the sum of \$2,831.85, at the office of the Parish Judge aforesaid, to the order of Walter Smith, and by him, Alexander L. Russell and A. G. Berren, indorsed; which said notes were *paraphed* with the act of mortgage, which was then and there executed by said Barker and his securities, for the purpose of securing said promissory notes, and were duly and legally acknowledged and recorded in the Parish of Concordia, according to the laws of Louisiana.

Complainant alleges that conventional interest of 10 per cent. is lawful in Louisiana; that by virtue of his appointment of administrator, and the transfer to him by the Parish Judge, he has become the lawful holder of said notes; that payment has been demanded and refused, and the notes duly protested, &c.; that Barker, without authority, and without the knowledge or consent of complainant, or of the Judge of the Parish of Concordia, fraudulently removed the slaves purchased by him, into the county of Jefferson, Mississippi, where they remain, except one who has died, and one who has gone to parts unknown; that Barker is insolvent, and has gone to parts unknown; that Smith has gone to Texas, and that Russell and Berren reside in Louisiana, and are insolvent. That by virtue of the non-payment of said notes, the right of complainant to have

Stacy v. Barker, et al.

the slaves aforesaid sold to satisfy said notes, became absolute ; that, of the slaves so mortgaged, Jim, Harrison, Washington, Charles, and Jerry, Kendrick, are in the possession of John Hall, in Jefferson county, as agent of the New Orleans Canal and Banking Company, who claim to hold them under a pretended purchase from Barker ; that Ephraim, when last heard from, was in the possession of G. J. Martin, in Jefferson county, who also claims under a pretended purchase from Barker ; that Oscar is in possession of Samuel Scott, of Jefferson, and that his name has been changed to Mitchell ; that David is in possession of Lewis W. Dangerfield, of Jefferson, both of which said Scott and Dangerfield claim to be purchasers from Barker ; that the other slaves are either dead or removed to parts unknown, &c.

Complainant charges that Barker had no right to sell the slaves, or any of them, and that his attempt to do so was a fraud upon complainant, and upon the mortgage, which was notice to all the world ; and that all such pretended sales are void. That said slaves would not now sell for half the sum due, and that the parties, in whose possession they are, refuse to deliver them up. It prays for *subpena*, answers, and injunction to restrain the removal of the negroes, &c., and for a foreclosure and sale of the mortgaged negroes, &c.

To this bill, the defendants, Dangerfield and Scott, demurred for five causes.

First. That the complainant did not allege whether he claimed the right to recover as administrator, under the authority of the Probate Court of Adams county, or under the authority of the Judge of the Parish of Concordia.

Second. That the complainant did not allege that the promissory notes mentioned in the bill, are the property of the estate, or that he is entitled as administrator of the estate to demand and receive their payment.

Third. Because he hath not shown or alleged how much of said notes is due the succession of Charles S. Lee, and how much the community in which Mrs. Lee is interested.

Fourth. Because Mrs. Lee is improperly made a party defendant to the suit.

Fifth. Because the bill does not allege that the defendants,

Stacy v. Barker, et al.

Scott and Dangerfield, are not purchasers for a valuable consideration without notice of the mortgage.

Ellett and Coleman, for Scott and Dangerfield.

The defendants Scott and Dangerfield demur to the bill ; and the ground mainly relied on is, that the bill does not show that they are not purchasers for *valuable consideration*, or that, at the time they respectively purchased the negroes in their possession, they had notice of the existence of the mortgage in Louisiana.

The bill alleges that Barker, after his purchase at the sale in Louisiana, fraudulently removed the negroes to Mississippi, and that Scott and Dangerfield respectively, hold under pretended purchases from Barker.

It is contended that they purchased the property discharged from the lien of the mortgage, unless it had been lodged for record in the proper office in this State, or notice of its existence is charged upon them.

Purchasers for valuable consideration, without notice, are the objects of the special favor and protection of courts, both of law and equity, and all purchasers are presumed to be of this description, unless the contrary is shown by him who seeks relief against them.

Our laws give effect to mortgages and deeds of trust, only from the time when they "*are delivered to the clerk to be recorded.*" How. and Hutch. Dig. 344, sec. 5.

And "*every deed respecting the title to personal property, which by law ought to be recorded, shall be recorded in the court of that county where the property shall remain.*" And in case of removal to another county, by permission of the owner, shall be recorded in that county within twelve months, or be void as to purchasers, &c., ib. sec. 4.

The provisions of the act are rigid, and plainly indicate the settled and cherished policy of this State on the subject — a policy as wise as it is severe in its exactions.

The present mortgage can only be sought to be enforced, in the face of this statute, upon the principle, that, by the comity of nations, the law of the domicil of the party, or the *lex loci contractus*, where the contract is not made at the place of domicil, is per-

Stacy v. Barker, et al.

mitted everywhere to govern the construction of contracts in relation to *movable property*.

This rule does not apply to *immovable property*, whether its location is real or *only fictitious*. Story's Confl. 305, § 371.

Whatever law is adopted, the *whole law* must govern—in regard to *what is movable property* as well as in regard to the proper construction and effect of contracts relating to it.

By the law of Louisiana, slaves are *immovable property*. Civil Code, p. 68, art. 461.

Recurring then to the laws of Louisiana, for the construction of this contract, we find that it was a contract respecting *immovable property*, which, by the comity of nations, can have no operation in *rem* beyond the jurisdiction in which the property was situated at the time of the contract. Story's Confl. 303—307; *Robinson v. Bland*, 2 Burr. 1079.

But it is not so clear, that, even in regard to movable property, the Court ought to give effect to a priority obtained under foreign laws, against purchasers or creditors, in the county where the property is subsequently found. Judge Story says, there is "*no inconsiderable conflict of opinion*" on the subject. Confl. of L. 336, § 402 a.

The Court would, therefore, seem to be at liberty to adopt the conclusion, that may appear most enlightened and salutary. And in view of the spirit and policy of our registry act, it is thought the Court ought not to hesitate in adopting such a rule as will best give effect to that policy.

Again—"When the *lex loci contractus*, and the *lex fori*, as to conflicting rights acquired under the laws of different States, come in direct collision, the comity of nations must yield to the positive law of the land." 2 Kent, Com. 461, 3d ed.

Such is the case now under consideration. The parties have conflicting rights, acquired under the laws of different States, and the complainant's claim can only be sustained at the expense of the positive law and settled policy of this State.

Real estate can only be conveyed or charged according to the law of the place where it is situated. If a particular mode of transferring personal property was required to be observed in this

Stacy v. Barker, et al.

State, it would be as necessary to pursue it, as it is to observe the forms of the law in the sale of real property.

This principle is settled by the Supreme Court of Louisiana. The law of that State requires a delivery of possession of personal property in order to a transfer of title as between the parties. The law of Virginia does not. A person domiciled in Virginia, there sold a ship, which at the time was in New Orleans. Subsequent to such sale and before possession was delivered, a creditor in New Orleans attached the vessel, and the Court refused to give efficacy to the sale in Virginia, because it was not perfected as required by the laws of Louisiana. *Olivier v. Towns*, 14 Martin, 93.

Our statute has not provided any form to be observed in the *sale* of chattels, but it has enacted, that "*all mortgages*," whether of real or personal property, shall take effect, against purchasers, *only* from the time of delivery to the clerk for record; and, in reference to deeds respecting the title of personal property, which by law ought to be recorded, has required the record to be made in the county where the property shall remain.

The registry acts are designed for the benefit of purchasers, to give notice of incumbrances. To give effect to a foreign unregistered incumbrance, against creditors or purchasers in this State, would confer upon strangers privileges denied to our own citizens, and would greatly impair the beneficial operation of the law.

No diligence could have discovered this mortgage. The records were silent. It slumbered four years in another State, and is now brought forward to defeat the rights of those who purchased in ignorance of its existence.

It is therefore submitted, that the demurrer to the bill ought to be sustained.

Sanders and Price, for complainant.

To the first objection, we reply, that the bill shows he was lawfully appointed administrator of Lee, in Louisiana, to whose succession the notes and mortgage unquestionably belong, and by his showing the letters of administration, and his qualifying as such, in this State, which is but ancillary to his appointment in Louisiana,

Stacy v. Barker, et al.

his right to sue here as administrator of said Lee, for the specific debt secured by said slaves, which pertained to the succession in Louisiana, is made manifest ; the several grants are but the acts of different sovereignties confirming the general right and title of administrator, and in this Court constitutes a unit, and which can only be questioned by plea, verified by oath. See How. and Hutch. p. 595, sec. 32 ; Story's *Confl. of Laws*, p. 422, § 513.

To the second, we say the whole bill exhibits a statement of facts, showing the said notes and mortgage to be the property of said estate of Charles S. Lee, and that he, as administrator thereof, is entitled to receive the payment. (See p. 4, and the latter part of page 5, of bill.) By the laws of the State of Louisiana, the Parish Judge makes inventories of successions of deceased estates, and after the inventories are furnished, he names an administrator to manage the property thereof, and obliges him to give good and sufficient security for the fidelity of his administration. See Civil Code of Louisiana, title Succession — particularly articles 1033 and 1034. The administrator thus chosen has the same powers, and is subject to the same duties and responsibilities, as the curators of vacant estates, under certain modifications. Same book, art. 1042. Curators of vacant estates are bound to take care of the effects submitted to them, as prudent administrators, and to render an exact and faithful account of the revenues they produce. The curators of vacant successions and of absent heirs, act in their names and quality, in all contracts or other proceedings in which the succession, or the heirs which they represent, are interested ; and appear in all suits, in which they are obliged to act in that capacity, either as plaintiffs or as defendants. Same book, articles 1140 to 1146.

In Louisiana, the administrator represents the movable, as well as immovable, property, and the heir has no interest until he accepts the succession, for he may renounce it. Same book, title Succession ; also, Story's *Confl. of Laws*, pp. 417, 418, and 419.

To the third and fourth, we say : in this proceeding, the whole property claimed belongs to the succession of Charles S. Lee. The community is an incident growing out of it, regulated and governed by the peculiar laws of Louisiana. The making Mrs.

Stacy v. Barker, et al.

Ann Lee a party, was because, in the process verbal of the sale and mortgage, the property is described as it is in the bill, “*as belonging to the succession of the said Charles S. Lee, deceased, and to the community heretofore existing between him and his wife, Mrs. Ann Lee.*” (See page first of Exhibit C.) Succession is the transmission of the rights and obligations of the deceased to his heirs. Civil Code, art. 867. Community property consists of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donation made jointly to them both, or by purchase, or in any other similar way, even though the purchase be only in the name of one of the two, and not of both ; because, in that case, the period of time when the purchase is made is alone attended to, and not the person who made the purchase. Same book, sec. 4, and particularly article 2371.

The principle is too familiar to require authorities, that all persons in interest, made to appear so by the bill, or any exhibit, are necessary parties. If she chooses, she can assert her community here, or abide her rights in Louisiana.

To the fifth, we reply, that the demurring defendants must look to those from whom they purchased, for protection ; they are in no better condition than their supposed vendor, Barker. The bill, however, does not admit or deny a purchase of said slaves by defendants ; it only alleges that they hold, under some pretended purchase, from Barker. It charges, that the negroes were mortgaged in Louisiana, and were removed to this State without his knowledge or consent, and without the knowledge or consent of the Parish Judge — who made the sale with special mortgage. The complainant in this case did not know the slaves were in Mississippi, they were unlawfully moved into it ; the mere introduction of slaves into the State, without the knowledge or consent of the owner, effects no change of property. The rights of the parties at the place from which they were removed remain the same, until time, and time alone, interposes a bar to their recovery. Whatever force the ob-

Stacy v. Barker, et al.

jection may have upon the transmission of property in this State, on general principles, it can have none in this case.

The defendant's solicitors have, in their brief, taken other objections than those contained in the demurrer; which we, however, regard as alike untenable, if no other objection existed against them.

The first is, that the mortgage set up by complainant was not recorded in this State. Neither law nor equity require unreasonable things. If Barker, the purchaser with special mortgage, removed the slaves from Louisiana to this State unlawfully, and without the knowledge or consent of the complainant, or of the Parish Judge (who alone represented the succession of the deceased), how preposterous, to require that they should have the mortgage recorded here! Upon the same principle, if any felon were to steal, or debtor run off, with property from a sister State, which had been incumbered by, or conveyed in, mortgage, and bring it here and sell it for a valuable consideration without notice, such purchaser could hold against the rightful owner, unless he could keep pace with the felon or fleeing party. We know of no such rule or principle.

The authorities referred to by defendant's counsel, in regard to the conflict of laws, can have no application to this case, for there is no conflict in the case; the complainant shows a perfect title or right, save the equity of redemption of defendant Barker. They hold under him, and in equity are subrogated to his rights; beyond that, if the allegations of complainants' bill, are true, which are admitted by the demurrer, they have none. We therefore insist that it be overruled, and that they be required to answer within reasonable time.

CHANCELLOR. The only facts which I deem it necessary to notice, in connection with the demurrer, are these. In the year 1840, Charles S. Lee died in this State, leaving a large estate, situated partly in this State, and partly in Louisiana. The complainant took administration upon said estate, both here and in Louisiana. A number of negro slaves belonging to said estate, were sold by the order of the Probate Court of the latter State, at which sale

Stacy v. Barker, et al.

the defendant Barker became a purchaser to the amount of upwards of twelve thousand dollars, and gave his several promissory notes thereon, together with what, by the laws of that State, is called a *special mortgage*, to secure the payment of the notes. The bill states the failure of Barker to pay his several notes, and alleges that he fraudulently removed the slaves so purchased and mortgaged, into this State, and that some of them are now in the hands of the other defendants, who claim them by virtue of some *pretended* purchase from Barker, and prays that the mortgage may be enforced against the slaves, so transferred by Barker. The defendants, Scott and Dangerfield, have demurred, and have assigned different causes. The one principally relied on, is, that the bill does not allege that these defendants had any notice of the existence of the mortgage at the time of their purchase. This, I apprehend, was altogether unnecessary. It is sufficient that the complainant shows the existence of a mortgage upon the property ; his rights to enforce it will be presumed, until the contrary is shown. That a party is a *bonâ fide* purchaser, without notice, is purely a matter of defence, and must be set up by the party who would avail himself of it ; whether notice be charged on the other side or not. *Gallatian v. Cunningham*, 8 Cow. 374. I apprehend that it is not necessary for the complainant, in such cases, to charge notice before it is denied on the other side ; but if it were otherwise, I should be inclined to regard the allegation, that the defendants hold by a *pretended* purchase, as equivalent to such a charge. What would be the effect of such a defence, in a case so peculiarly circumstanced as the present, is a question about which it is unnecessary to intimate any opinions in the present aspect of the case. I have no doubt, that, so far as the complainant's title to sue is concerned, he shows sufficient to authorize him to maintain the suit in his character of administrator in this State. I have as little doubt, that Mrs. Lee is a proper party to the bill. Let the demurrer be overruled, with leave to the defendants to answer in thirty days.

Chewning, et al. v. Nichols, et al.

DECEMBER TERM, 1843.

JAMES J. CHEWNING, et al. v. J. NICHOLS, et al.

A mere motion in Court, to dissolve an injunction granted in a case, is not that formal entry of appearance, which will authorize the complainant to take a *pro confesso*, against the party making the motion.

To justify the complainant's taking his bill for confessed, process must either have been served upon the other party, or his appearance as a defendant to the cause formally entered of record.

There are no regular appearance-days fixed by the rules of this Court; a party desirous of entering his appearance can do so, at any time while the Court is in session, by making his application and having it entered of record.

A MOTION was made in this cause, to set aside the *pro confesso* heretofore entered against the defendant, Joseph Nichols, because he had never been served with process, and no special appearance had been entered for him. Upon examination of the general docket, it appeared, that the subpœna, as to Nichols, was returned, not found; but that, upon motion on a former day of the Court, the injunction originally granted in the cause had been dissolved.

Mr. A. J. Paxton contended, that this was such an appearance as would entitle the complainants to take the bill for confessed.

Mr. Smedes was stopped from arguing in behalf of the motion.

By the CHANCELLOR. The motion must be granted. The appearance of the defendant, in making a motion to dissolve an injunction pending against him, is not of itself such an appearance as will justify the taking a *pro confesso* against him. A bill can only be taken for confessed where process has been, in the proper way, and in sufficient time, executed, or where the party defendant *enters his appearance*.

An appearance is the first act of the defendant in Court, and is either *voluntary* or *compulsive*; a service of process is not of itself an appearance, but the practice in England, in the courts of King's Bench and Common Pleas, was to enter the appearance of record, before other steps were taken in the case; and in the King's

Chewning, et al. v. Nichols, et al.

Bench, a *voluntary* appearance was of no effect, unless the plaintiff's attorney, within fourteen days after such appearance, sued out a writ of *latitat*, or bill of Middlesex, where the defendant resided in that county. 1 Salk. 8.

By the common law rule, a common appearance could be entered by the defendant, or his attorney, provided the latter had the king's *special warrant*, or *by writ*, or *letters patent*. It could be entered by the defendant at his own instance, or in consequence of a rule of court or judges order, for discharging him out of custody, on filing or entering it. It is only by statute (West. 2, 13 Edw. 10), in England, that a general liberty is given to parties of appearing by attorney. They were anciently appointed in Court, when actually present, but they are now usually appointed out of Court, by *warrant* of attorney, which should regularly be in writing; but an authority *in parol* is said to be sufficient to support a judgment. 1 Tidd's Practice, 92.

An appearance by the party defendant, could only be made by a formal entry of *common bail*, as it was termed with the *filacer*, who is so called from the *files* of the *custos brevium*, of his appearance, and afterwards his appearance was entered in Court upon a certain day, called the appearance-day or *dies amoris*, which was the day given *ex gratia curie*, for the defendant's appearance; by the present practice, in England, the first and last days of every term, are days of appearance.

An appearance, whether compulsive or voluntary, signifies the defendant's signing *common* or *special* bail; and there could be no appearance in any other mode, when made without the intervention of an attorney.

It will, from this sketch of the mode of entering an appearance, be at once apparent, that a mere motion in Court to dissolve an injunction, is not that formal entry of appearance which is required by the old common law, and which is still the law of this Court, so far at least as the formal entry of the party of his appearance as defendant in the case, is required to be inserted in the record.

There are no regular appearance-days fixed by the rules of this Court, and a party desirous of entering his appearance, can do so at any time, while the Court is in session, by making the application, and having it entered of record.

JANUARY TERM, 1844.

W. M. GWIN v. W. P. STONE.

A bill may be taken for confessed, even though the exhibits to the bill are not filed.

In this case the bill had been filed without its exhibits ; on the return of process “*executed*,” the complainant took the bill for confessed, and a motion was made to set aside the *pro confesso*, upon affidavit.

Judge Thompson, however, desirous of settling a point of practice, inquired whether a party complainant has a right to take a *pro confesso* before the exhibits to his bill are filed ?

By the CHANCELLOR. I can have no doubt of it ; the exhibits are matters entirely of evidence : they come properly for the consideration of the Court at the final hearing, and have no connection with the taking of the *pro confesso*. That can always be taken, upon service of process, or the appearance of the party, in the mode prescribed by law.

JANUARY TERM, 1844.

THOMAS COTTON v. JANE PARKER, ADM'X.

A rehearing will be granted, as a general rule, when the party applying has complied strictly with the rule of the Court, in procuring the certificate of two respectable counsel in support of it, but not otherwise.

THIS case had been submitted at the present term of the Court, for final hearing, and the Chancellor had ordered a decree against the complainant.

A motion was entered upon the motion-docket for a rehearing, accompanied with a petition ; signed, however, only by the complainant's solicitor.

By the CHANCELLOR. A petition for a rehearing will never be allowed, unless the rule requiring two respectable counsel to certify that they have examined the papers and think the case should be reinvestigated, has been complied with. In such case I should, as a general rule, however well satisfied I might be with my former opinion, not hesitate to grant a reargument. It is not, in any case, a matter of right ; but in the exercise of that discretion with which I am clothed, I shall never prevent the fullest discussion, or refuse to hear additional argument, where, in the manner and under the guards prescribed by the rule on that subject, it is requested of me.

DECEMBER TERM, 1843.

JOHN M. PINTARD v. GREEN T. MARTIN, et al.

Where a vendee takes from his vendor such title only as the vendor had, he cannot afterwards, for mere defect in title, obtain a rescission of the contract.

Where a vendee comes to the knowledge of a fraud practised upon him in the sale of property, and afterwards continues for a series of years in the use, enjoyment, and occupation thereof, without taking any active measures for redress, or making known any dissatisfaction, until a change of times may have depreciated its value, he can have no relief in equity.

A court of equity will never rescind a contract, unless the parties can be put *in statu quo*.

Where a party having knowledge that he has been defrauded, proceeds to do acts in confirmation of his contract, by voluntarily entering into a new engagement concerning it, he will be held thereby to have waived the fraud, and to have renounced that relief which he might otherwise have had in equity.

THE abstract and brief, prepared by L. Sanders, Jr., Esq., present a very full and fair statement of the case, and have been accordingly adopted.

The bill was filed on the 9th of May, 1842.

Sanders and Price, for complainant.

The bill charges that on the 14th February, 1839, the defendants Martin, Compton, and Lawton, represented that they were a committee of certain persons thereafter named, styling themselves the Steam Saw Mill and Cotton Press Company, at Rodney, Mississippi; that said company were the owners of the land and adjacent lands, lots of ground, described thereafter, upon which a certain grist and saw mill was then being erected and partly finished, together with the property, real and personal, thereto belonging and appertaining, excepting certain machinery for a steam cotton press. Complainant, and one John Chaney, confiding in said representations of said Martin, et al., contracted with them for the purchase of said property, at the price of \$4812; a memorandum whereof was then reduced to writing by said committee, and signed by them, copied in said bill and the original filed, marked Exhibit A, which sells to said Pintard and Chaney "all the right, title, interest, property, claim, and demand, either in law or equity, that the said com-

Pintard v. Martin, et al.

pany has in and to the saw and grist mill now partly finished ; and all the property, both real and personal, thereto belonging or in any wise appertaining, excepting the machinery for a steam cotton press; and we further assign and transfer to said Pintard and Chaney, the bond of H. M. Bassett to said company, for title to certain property therein mentioned ; also, the bond of Sarah Calvit for title to certain property therein named as the Greenwault property.” The bonds referred to are filed exhibits B and C, and are referred to the Court as the best explanation of them. The bill shows that on the 4th January, 1838, Jacob Greenwault, since deceased, for the expressed consideration of \$8000, secured to be paid by J. B. Warren, G. T. Martin, Fauver and Farnsworth, John Goodin, and Thomas A. Compton, did assign and set over and transfer all the right, title, interest and claim, and demand, mentioned in a certain obligation of Sarah Calvit, meaning Exhibit C; which assignment is made Exhibit D, and part of bill. That at the time of said purchase, said mill was erected mainly *upon and across* the eastern end of said Commercial street, as laid off by the incorporation of Rodney, embracing a few feet upon lot No. 1, described in one of said exhibits. It was bounded on the N. E. by a bayou emptying into the Mississippi river, which bayou was considered and represented by said committee, at the time of said purchase, as appurtenant and constituting a part of said mill property, and was and is in fact essential to the profitable working of said mill ; that on the north of said mill-building there is a strip of land, of about 25 feet wide and 45 feet deep, extending to the Mississippi river, over which there is and was in progress, a *log-way* for carrying of logs used and sawed at said mill ; that said piece of land was represented to complainant by said committee, at the time of said purchase, as constituting a part and parcel of said mill property and of its appurtenances ; that the only inducements complainant had, at the time of said purchase, were the anticipated profits of working the same as a saw mill; that the only source of a supply of timber to said mill to make its work profitable, is by floating it on the Mississippi river and landing it opposite the front of said mill, and floating the same into said bayou ; which, by its position and contiguity to said mill, affords a safe and convenient harbor for the same, and is absolutely necessary for the

Pintard *v.* Martin, et al.

support and profitable working of said mill. Complainant files a rude diagram Exhibit (E), showing the position of said mill, and lots and streets and bayou, and parcel of ground, in front of said mill ; that in addition to the said sum of \$4,812·50, he and said Chaney agreed to pay to said committee, for and on behalf of said company, the further sum of \$15,159·52, by the taking up and paying the following claims against said company: one note to Commercial Bank, of Rodney, due on the 9th July, 1838, signed by Andrew Brown, G. T. Martin, A. Farnsworth, Thomas A. Compton, and J. B. Warren, for \$2,562·27 ; note to same, by same parties, due 9 – 12 March, 1839, for \$2,747·25 ; notes to J. Greenwault, for \$2500, \$2000, and \$1500, making \$6000 ; to H. M. Bassett, due 1 May, 1837, for \$1125 ; claim of J. M. Smith, for \$1725 ; a memorandum of which Exhibit F, is made part of bill : shows that said mill stock, as represented by said committee, is in fifty shares, and composed of the following named persons : J. M. Smith, 4 shares ; J. Goodin, 4 ; G. T. Martin, 4 ; Josiah Lawton, 4 ; Fauver and Farnsworth, 12; John Ducker, 7; George Overaker, 4 ; T. A. Compton and J. B. Warren, 4 ; R. B. Rickets, 2 ; Abn. Montgomery, 2 ; Andrew Montgomery, 1 ; James B. Knight, 1, and Charles W. Davenport, 1 share : that the said Fauver, J. M. Knight, and John Ducker, were dead at the time of making said contract by complainant and said Chaney ; that at the time of said purchase, complainant and said Chaney were entirely ignorant of the manner of the association of said company, or of whom it was fully composed ;—but confiding in the fair dealing and integrity, and legal knowledge, of the said committee, he and said Chaney went on to improve and finish said mill, at their own proper costs, and did thereby expend, in finishing the same, the sum of at least three thousand five hundred dollars ; they expended in permanent and lasting improvements, and necessary repairs on the house on said Greenwault's lot, at least the sum of five hundred dollars ; and paid the shareholders the following sums of money: G. T. Martin, \$449·40 ; George Overaker, \$428 ; J. M. Smith, \$227·03 ; J. W. Davenport, \$112·30 ; to Andrew Montgomery, about \$200 ; and gave to each of the other stockholders (subsequently, as dates show), through said committee, their notes for the amounts they were respectively

Pintard v. Martin, et al.

entitled to agreeably to the terms of their original contract, which are either outstanding, or on which judgments have been obtained against them, and hereinafter shown : refers to exhibits G, H, I, and J, of those taken in and paid, as part of bill : shows how the said claims were adjusted and suits instituted by the holders, and complainant and Chaney becoming bound in forthcoming bonds, &c., referring to suits, &c.; the purchase of land of said Smith, after discovering that a portion of it did not belong to said company, as by said committee stated ; the contract of which is filed.

Complainant shows that, on the 18th day of March, 1841, he purchased from said John Chaney his entire interest in said mill property, and exhibits the written evidence thereof, marked M, and made part of bill. Complainant charges that he never had occasion to investigate the title of said company to said mill property, until some time after his purchase of the said interest of the said Chaney; that he was directed to the same in consequence of some threats received of said Smith, one of said company, and who stood by and saw complainant purchase the same and make lasting and valuable improvements thereon, without disclosing to him the condition of the title of said property. Complainant expressly charges that *the said mill company have no title to the ground upon which said mill stands; that said company never had any title to the largest portion of the ground upon which it stands, either in law or equity; that they have no title either in law or equity, for said bayou, or said piece of land between said mill and the river, used as a log-way.* That committee at the time of the said sale knew that they had no title to the same, but fraudulently and unjustly withheld from complainant and his then partner, Chaney, all information in regard to said deficiency of title as within their knowledge ; that said committee at the time of said sale fraudulently and falsely represented unto complainant, that they had full power and authority to sell said property, when in truth and in fact they had no sufficient or valid authority whatever to sell or dispose of the same, from the said members of said company ; that at the time of said sale, said Knight, Ducker, and Fauver, were dead, and no one of their heirs or legal representatives has ever authorized the said Martin and others, acting as a committee, to sell said property for them ; that on the

Pintard v. Martin, et al.

14th day of February, 1839, there were judgments in the circuit courts of Jefferson and Adams county, against the estates of said Thomas A. Compton, said Fauver & Farnsworth, George Overaker, Jeremiah B. Warren, and said Ducker, before his death, which remain due and unsatisfied, and which severally now remain and constitute liens upon said property, if they, the said last mentioned stockholders, or said company, had any title thereto ; that at the time of said purchase complainant and said Chaney were wholly ignorant of any such judgments or liens, and never discovered the same until recently, as before stated : shows the different judgments recovered and the bonds signed for said assumptions and levies made upon said property, and charges that each bond so signed was at the instance and request of said committee ; and the plaintiffs in each of said judgments well knew that the bonds were signed by complainant and Chaney solely for the purpose of complying with the conditions of said purchase, believing at the time that he had acquired a full and complete legal and equitable title in and to said property, and did not discover to the contrary until afterwards, as before stated. Shows also, that he has been sued for the recovery of said lots and land, in an action of ejectment, instituted in the circuit court of Jefferson county, wherein John Doe, on the demise of John Ives, and others are plaintiffs, against the said Green T. Martin, the said Chaney, complainant, and others, amongst whom also is the said James M. Smith, defendants ; by means of all which he alleges he has been greatly cheated and defrauded, and has sustained great loss of credit in and about his business, by and in consequence of his being unable to exhibit and show title in said property, or in those from whom he purchased it; or if such persons had any title, it is a mere equity, laden with incumbrances and difficulties, that complainant knew not of at the time of his purchase, and which would be unjust, inequitable, and oppressive, for him to remove, if indeed the same were practicable, which is not believed by him to be so ; and in consequence of which, also, he is unable to sustain and obtain that credit which entered into the essence of the original purchase, and which it was understood and known by all the parties to said purchase, would be expected and looked for by complainant and said Chaney, at the time of making the same ; for

it was expressly represented by said parties at the time, that should complainant and Chaney be unable to meet the payments by the reasonable profits of said mill, that, with the improvements which he and Chaney should put upon the same, and in truth were put upon it, they would be able to sell said property for a large profit, and thereby be enabled to pay said purchase-money; but in consequence of the defect and utter want of title in same by said company, no one is willing to purchase it for any price whatever, as known to complainant; and complainant is unwilling to hazard either more of his capital, or labor, or industry upon it, from the just apprehension he entertains that the same cannot be held by him, or a good title be acquired for the same; charges fraud and insolvency; makes each one in interest a party; prays that said judgment creditors may be enjoined from proceeding in said judgments (no injunction was ever granted, or bond executed); that the defendants answer, &c.; that said committee exhibit their title, &c.; and, on final hearing, prays this honorable court to decree a rescission of said contract with said committee and said J. M. Smith, and that they be compelled to take back said property purchased as aforesaid, which he offers and tenders; perpetually to enjoin the judgment holders from proceeding on said judgments as against him, and that said notes outstanding be surrendered and cancelled; and prays a decree over against said Martin and the mill company, for the aforesaid sums of money paid by complainant and said Chaney, in pursuance of said purchase, together with the amount expended in making improvements, &c.; and for general relief. The bill is sworn to. The defendant Smith has filed a separate demurrer; no other defendant has appeared. And this cause is now set down by complainant, on motion, to be heard upon general demurrer.

If the allegations of the bill are true, we have no doubt that a good cause for equitable jurisdiction and relief is made out. The fraud is strongly charged; the defect of title clearly stated; the importance and absolute necessity of the slip of land next the river, and of the bayou, for the purpose of the mill, clearly shown; and it is also shown that the mill itself stands upon a public street of Rodney, the title of which belongs to the corporation and successors, or the people of the place. The subjects are so familiar to your

Honor, that I think I should trespass by referring to general principles, no particular case is required to elucidate.

J. A. Guernsey, for defendant Smith.

I submit the following points:

1st. That Smith does not appear by the bill to have been a party in any wise to the original contract between the "committee," and complainant, and Chaney, nor to the bond in relation to the "Greenwault" property, executed by Sarah Calvit.

2d. That Smith should not be held accountable for any alleged misrepresentations made by said "committee."

3d. That if there were judgment liens upon the property, purchased by complainant and Chaney, at the time of the purchase, the doctrine of "*caveat emptor*" fully applied, there being no warranty of title, and the same rule applies to the manner in which the company was formed.

4th. That Smith, individually, was not bound in law or equity to notify complainant of the defect in the title derived from the "mill company," through the committee.

5th. That Smith, as an individual, cannot in any way be held to convey to complainant a *right of way* over his *individual* property, to *enhance the value of, or even to render valuable*, the property conveyed by a committee of an informal association, of which he was an inconsiderable member; nor can he be held to convey such right of way, for the purpose of *enhancing the value* of other property, bargained by *himself* to complainant and Chaney, when the property *so bargained*, independent of that conveyed by the committee, is not to be affected by such right of way.

CHANCELLOR. This case was submitted on the demurrer of Smith, one of the defendants thereto. The object of the bill is to rescind a contract, made by the complainant, with three of the defendants, representing themselves and the other defendants as the owners of a steam, saw, and grist mill, situated in the town of Rodney. The grounds upon which a rescission is asked, are:
1. That the defendants had no title, whatever, to any part of the

ground on which the mill is situated. 2. That they fraudulently represented as included within the boundary of the mill property, a piece or lot of ground, which is essential to its value and enjoyment, but which, in fact, is not so included. 3. That the defendants, from whom he bought, had no power to bind the other joint owners of the property. 4. That an action of ejectment is now pending against him, under a title adverse to that of his vendors. As to the objection for want of title, it is a sufficient answer to say, that the complainant appears to have accepted a mere quitclaim, by taking a conveyance simply for such title as the defendants had; he can have no relief, therefore, on that ground. As to the want of power, on the part of those who made the conveyance, to bind the other joint owners, even if authority was wanting, it is apparent, from the statements of the bill, that the other owners, or partners, subsequently recognized the validity of such sale by acting under it, taking the benefit thereof, and performing such other acts of recognition, as would bind them, at least, in a court of equity. The complainant's only claim to relief rests upon the allegation of fraud. In addition to the charge of fraud upon *all* the defendants, it is specially charged against the defendant Smith, that, although he was one of the joint owners of the mill property, so purchased by the complainant, he afterwards set up a separate claim in himself, to a part of the land which had been falsely represented as included in said purchase. It appears, that the complainant then purchased the disputed portion from Smith, took from him a mere quitclaim deed, and gave his note for the amount agreed on, including also Smith's share of the purchase-money agreed to be paid to him, under the first sale. The complainant now asks to rescind both contracts, and to enjoin the collection of the money due on the note. It is apparent from the bill, that he has been in the possession and use of the property since February, 1839; and it is quite clear, that, as early as February, 1840, when he was advised of Smith's claim, and purchased the same, he must have then become acquainted with the nature and extent of the fraud, if any, which had been practised upon him in his first purchase; and yet we find him, at that point of time, waiving any vice that may have infected the original contract, by renewing his obligation relating thereto,

so far as Smith was concerned, and then remaining quiet for more than two years before filing his bill, or instituting any active measures for relief, against the alleged fraud. These facts appear from the bill, and accompanying exhibits, and are therefore proper subjects for notice under the demurrer. Whether they amount to a waiver of the alleged fraud, and a confirmation of the original agreement, is the question to be decided. I think it may be safely laid down as a rule of equity, that where one comes to the knowledge of a fraud practised upon him, in the sale of property, and afterwards continues for a series of years in the use, enjoyment, and occupation thereof, without taking any active measure for redress, or making known any dissatisfaction, until a change of times may have depreciated its value, he can have no relief in chancery. To extend relief, under such circumstances, would be to encourage one fraud, to the end of giving relief against another. As a general rule, a court of equity will never rescind a contract, unless the parties can be put *in statu quo*; nor will it lend its aid to one, whose hands are contaminated with the very vice which he charges upon his adversary, as a ground of relief. *McDonald v. Neilson*, 2 Cow. Rep. 139.

In this case, the complainant not only remained passive for years after he was advised of the alleged fraud, but, with a knowledge of all the circumstances, reaffirmed the contract, by voluntarily obligating himself anew to perform it. The authorities fully establish the position, that if a party, having knowledge that he has been defrauded, proceeds to do acts in confirmation of his agreement, by voluntarily entering into a new engagement concerning it, he will be held thereby, to have waived the fraud, and to have renounced that relief, which he might otherwise have had in equity. Fonbl. Eq. 129 (note (r), 3 Am. ed.) ; *Chesterfield v. Jansen*, 2 Ves. sen. 125 ; 1 Atkyns, 354 ; *Morse v. Royall*, 9 Ves. 364 ; *Sadler v. Robinson's heirs*, 2 Stew. Rep. 520.

I am accordingly of the opinion, that the demurrer of Smith must be sustained, and the bill, as to him, dismissed.

DECEMBER TERM, 1843.

P. B. POPE v. THOMAS ANDREWS, *et al.*

A sale, by one greatly in debt, and whose every means were more than demanded to meet his immediate pressing wants, of his property on a credit of nine, ten, and eleven years, is made "*with intention to hinder, delay, and defraud creditors.*"

If a vendor make a fraudulent sale of his property to avoid the payment of his debts, to a vendee, ignorant of the fraud of the vendor, the vendee will be protected, as a purchaser for valuable consideration.

Fraud may be inferred from facts and circumstances, such as the nature of the contract and the relation and circumstances of the parties.

A vendee of land held to be privy to the fraud of the vendor ; 1. Because he was the brother of the vendor, and lived in the same neighborhood, and sometimes together ; 2. Because the vendor at the time of sale was embarrassed by debts, and that embarrassment known to the vendee, and the vendor had declared his intention not to pay the debts embarrassing him, which declaration, from their relation, the vendee was presumed to have known ; 3. Because the sale was made upon a credit of eleven years, and the vendee knew the effect would be to divest the vendor of all his property, and thereby hinder, delay, and defraud creditors in the collection of their debts.

A defendant charged with colluding with his co-defendant, in regard to the transaction sought to be impeached, cannot be a witness for his co-defendant, especially, where he is liable for costs.

A vendor of land, who has taken a deed of trust to secure to himself the purchase-money, is not a competent witness for the vendee, when the sale is attacked as fraudulent, to prove its fairness, or testify in relation to it, he being directly interested in upholding the sale, in order to enforce payment of the notes secured by the deed of trust.

THE bill states, that, at the May term, 1839, of the Yazoo circuit court, Hayden, for the use of Pope, recovered a judgment against Vance and Joseph Andrews, for \$3,832.55. Execution issued on this judgment, and in January, 1840, was levied upon certain land, in all, 2,074.51 acres, as the property of Joseph Andrews, which land, by virtue of this levy, and others of a younger date, was sold after legal advertisement, to complainant, for \$2,902.79, who received from the sheriff a deed therefor. That Joseph Andrews, by deed, dated 4th March, 1839, conveyed the same land to Thomas Andrews, his brother, who is by trade a carpenter ; was worth nothing when he came to Yazoo county, where he had lived two or three years, and that, after date of his sale, he continued to work at his trade ; that the convey-

Pope *v.* Andrews, et al.

ance from Joseph to Thomas Andrews is fraudulent ; that all the property of "every character and description whatever, which Joseph Andrews owned," is conveyed by that deed ; that since the conveyance, Thomas Andrews had exercised but little control over the property, certainly not so much as Joseph Andrews, who remains on the place, superintends, directs, signs receipts as *agent* for his brother, strips the cotton, &c. Thomas Andrews made a deed of trust to Washington Dorsey, and others, to secure the purchase-money, agreed to be paid by him to Joseph Andrews, for the property sold, as aforesaid ; which notes were payable as follows, to wit : \$3000 payable at two years after date, and three notes for \$20,684.66, payable at nine, ten, and eleven years after date each, and all dated 4th March, 1839 : that Thomas Andrews was worth nothing when he came to Yazoo county, and has accumulated nothing since ; and though a respectable workman, was the last man to whom the most visionary speculator would have thought of selling a large property on long credit : that at the time of this sale, Joseph Andrews was largely indebted, in fact owed more than he was worth, by \$20,000. The debt in favor of Hayden had been long due, and was put in suit soon after the sale, to wit, on the 15th March, 1839 : that no consideration ever passed, or is ever to pass, from Thomas to Joseph Andrews, and that Thomas holds the property for the purpose of defrauding the creditors of Joseph Andrews, the sale to him having been made with that intent.

The answer of Joseph Andrews admits the rendition of the judgment, and the purchase by Pope, at sheriff's sale, as stated in the bill ; also the sale of the land from him to Thomas Andrews, and the execution of the deed, and deed of trust, as stated in the bill ; admits, that about the time complainant's judgment was rendered, other judgments to about \$6000, or \$7000, were rendered against him ; denies, that when he sold to his brother, he was in debt \$20,000 more than he was able to pay, and says he owed but little compared with his worth ; and believed then, and now believes, he can pay all he owes in the world, without applying to it any part of the purchase-money of the property he sold his brother ; denies that the sale to his brother was fraudulent, or

Pope v. Andrews, et al.

made with intent to hinder, delay, or defraud his creditors, or that he is the owner of the property, or has any other interest in it, than the deed, and deed of trust, import ; but that the property is the rightful property of his brother, the sale having been fairly made to him. When he sold to his brother, he was in feeble health, and had been advised by his physician to leave the State, in order to its restoration. That he was a single man, his brother a married man, and he was willing to sell him a good bargain, if he could ; that the price his brother agreed to pay was as much as the property was worth, or as any other person would have agreed to give. The land sold was uncleared woodland. That of the slaves, only seventeen or eighteen were working hands ; the balance being children, some at the breast ; says it is true, his brother is a carpenter, as is Joseph Andrews ; but denies that his brother was worth nothing, but says he was worth \$10,000, or \$12,000 ; denies that he exercises ownership or control over the property ; admits he occasionally resides with his brother, and says, he on one occasion signed a receipt in the name of his brother, and procured an advance to be made on his cotton, and refers to his brother's answer, to explain this transaction.

The answer of Thomas Andrews admits the rendition of the judgment in favor of complainant, and the sale by the sheriff to him, as stated in the bill ; admits the insolvency of Vance ; also the execution of the deed by Joseph Andrews, and the deed of trust by himself to Dorsey and Regan ; admits that judgments for \$6000 or \$7000 were obtained against Joseph Andrews at the same term complainant's judgment was rendered ; but denies that his brother was then indebted \$20,000 more than he could pay ; but he then thought, and still thinks, his brother was able to pay all he owed, and have left, a handsome estate ; admits he is a carpenter by trade, and worked at it when he bought of his brother ; denies that he was then worth nothing ; says he was worth \$10,000 or \$12,000 ; denies that the sale was made to him in bad faith, or with a view to hinder, delay, or defraud the creditors of his brother, but says it was made in good faith ; that his brother was in ill health, and had been advised by his physician to leave the State ; his brother was a single man, and had no family ; he was

Pope v. Andrews, et al.

married ; that he agreed to pay a full price for the land, and slaves, giving more than \$10 an acre, for woodland, and an average of \$1000 for slaves, and in like proportion for other property ; denies that Joseph Andrews is the owner of the property, or that he has any other claim to it, or lien on it, than is given by the deed of trust ; admits that Joseph Andrews lives with him, occasionally, but denies that he exercises any ownership or control over said property ; admits that at one time he signed a receipt, as his agent. The circumstances were as follows : Respondent had agreed to advance Joseph Andrews some money out of the crop of 1836, and he gave Joseph Andrews authority to procure an advance upon that crop, and to sign his name to a receipt, he being absent from the country. Joseph Andrews got the money of complainant, and gave him the receipt ; states that his brother is able and willing to pay all his debts, and that the sale was made to him in good faith, and for the consideration expressed in the deed, and deed of trust ; that it was absolute and unconditional, and without any reservation to his brother, in secret, or otherwise, other than appears on the deed, and deed of trust.

The proof in the case was as follows :

1. Hiram Harrison, witness for complainant, states that in the spring of 1836, he travelled up the river with Thomas Andrews, who informed him, that the winter before he had made, and had then with him, \$500 or \$600. He also got some exchange on New York at Vicksburg, but what amount he does not know.

Washington Dorsey, also for complainant, says, that he was a party to the deed of trust in controversy, and had no reason to believe that the conveyance was made to defraud the creditors of Joseph Andrews. He was the physician of Joseph Andrews, and advised him, from year to year, to sell out his plantation and leave this country, as his health was very bad ; Andrews replied he would not leave unless he could sell his property. He afterwards informed Dorsey that he had sold the plantation, on which he resided, to Regan ; afterwards he said he had sold his other property to his brother Thomas ; shortly after the sale to Regan, he said the proceeds of his crop of 1839, and that sale, would place him free from debt, and leave him a surplus.

Pope v. Andrews, et al.

Stephen G. Mathews, another witness for complainant, knows nothing of either of the deeds, except from rumor; knows that Joseph Andrews was a carpenter, of the firm of Vance & Andrews, that Vance acted very imprudently in using the firm name to a large amount, as drawers and indorsers; the witness indorsed a note for \$2700, drawn by Vance & Andrews, and thought when he heard of the conveyances, that they were made to protect Joseph Andrews against the imprudent conduct of Vance, and that he was still of that impression; that Joseph Andrews told him the copartnership of Vance & Andrews was limited, and that he was *not* liable for any of Vance's indorsements. The note which witness indorsed has been paid.

Jefferson J. Hughes, a witness for complainant, knows that Joseph Andrews was largely indebted to the Commercial Bank of Manchester, on the 4th of March, 1839, as principal and surety, but cannot say how much of this liability was of Joseph Andrews, individually, nor how much on account of Vance & Andrews. He also holds a note of Andrews (Joseph) for about \$3200, in favor of Hayden, and thinks, from facts developed since 4th March, 1839, that the solvency of Joseph Andrews was then doubtful.

A. G. Harrison, a witness for same; upon examining the clerk's office, finds that Joseph Andrews was sued on and before the 4th of March, 1839, for about \$22,500; and on examining the execution-docket of the sheriff, at May term, 1840, finds an execution for \$2800, against Joseph Andrews and others, returned "no property found."

The deposition of the defendant, Joseph Andrews, a witness for defendant, Thomas Andrews, was taken under an order of Court, subject to all exceptions as to competency. Before giving his deposition, he filed a release from Thomas Andrews, of the covenants of warranty, in the deed of the latter to him in case the title to the land should prove defective; he states, that for several years his physician had advised him, from time to time, to arrange his business, and leave the State, in order to restore his health; that, for several years before the sale to his brother, he had made efforts to sell his lands, and part of his field negroes, in order

that he might leave the State, and travel for the restoration of his health, having had a severe spell of sickness every year, for four preceding years. In the winter previous to the sale to his brother, he had an attack which nearly deprived him of life, and weakened his mind in proportion, from inflammation of the brain, and his physician told him he was unable to attend to the drudgery of a plantation. He owed the Commercial Bank of Manchester \$3000 or \$9000, and a small debt to the heirs of Howell Runnels. The notes in bank were not due; part of the debt to the heirs of Runnels was due. He believed, from the proceeds of his crops, he could have paid all his debts, without any trouble, if he could have attended to business himself. His partner, Mr. Vance, having failed to pay some debts of the witness, as he had agreed, witness concluded he might fail to meet some of the notes in bank when due, and that, consequently, a heavier indebtedness would fall on him than he could meet by the proceeds of his crops, without his personal supervision, and which he was unable to give; witness therefore agreed to sell his improved plantation to Mr. Regan, who agreed to give \$22,000 in one, two, and three years; Regan was punctual and prompt in his dealings, and witness did not doubt but he could meet the payments very easily. He believed that Regan's two last payments would pay all his individual debts, not due, and that the proceeds of his previous years' crop, and his bank stock, would pay all he owed them due, and leave him a small cash balance, while he would have \$7000, Regan's first payment, falling due in eight or nine months. His brother also owed him \$4000, falling due in about the same time, for other property sold him, and not included in the deed of trust. The two last-named sums were believed by him to be sufficient to take up all the liabilities he was under, originally, for the firm of Vance & Andrews, and which were about \$10,000. The book-keeper of the firm of Vance & Andrews, had, a short time before, made out a statement for him, showing ample means to pay all the debts of the firm, so far as they appeared on the books, if one half only could be collected in a reasonable time. Sometime after the sale to his brother, he went to Manchester, to settle with Tucker, the agent of Runnels' heirs, and arranged to pay him with his bank

Pope v. Andrews, et al.

stock. Mr. Hamer, the president of the bank, however, refused to transfer it, saying Vance had overdrawn for \$3000, and he would not pay over to witness any balances, or transfer his stock, till that was paid, which overcheck Vance had procured by false statements, &c. This was the first time he had any doubt of the correctness of Vance's conduct; witness then determined to secure all the debts which he owed with undoubted papers, which he believed would be paid in eight or ten months, and he accordingly did secure the whole of Vance's delinquencies, amounting to \$14,000 or \$18,000, with such papers, including that of Mr. Regan; although Vance assured him he would meet all the firm debts, and that he had sufficient means to do so, without any injury, of much consequence, to witness; witness had no design of fraud upon any creditor, but made the sales in order to enable him to pay all his debts, and to prevent the possibility of loss to his creditors, which witness then believed to be his duty, both to them and himself. The property sold to his brother, he never expected to have occasion to use in payment of his debts; in fact, as his health was so feeble, he did not expect much to have any use for it, and thought it most probable his brother would only have to settle with the other brothers, and heirs of witness. The land sold to his brother, though of a good quality, was a dense forest, entirely unimproved, and could not be made productive, to any extent, in less than four or five years, with much labor and expense. The price he obtained, was as much as others, in whom he could confide to pay, and not treat the slaves cruelly, would have given. He believed, at the time he sold to his brother, that he had ample means to meet every debt he owed in the world. The land was worth \$12 or \$15 an acre, in cash: he rated it to his brother at \$20, and the slaves at an average of \$1000, big and little, which witness believed a full and fair price for the property; witness gave so extended a time for payment, to enable his brother to clear the land, and make the payments out of the proceeds; so far from intending to defraud his creditors, witness then believed that he had made ample arrangements to pay all his debts; witness has paid every execution against him, except one in favor of Commercial Bank of Manchester, for the use of

Pope v. Andrews, et al.

Moore, which was rendered on process served, while witness was out of the State, which witness has enjoined, and which he has been advised by his counsel he is not bound to pay, as the note is signed in the name of the firm, as surety for another; though witness is able to pay this note, if he should ultimately have to do so: witness always believed himself able to pay, and intended to pay complainant's judgment, and made an arrangement with complainant, as he understood, to do so: but complainant concluded not to abide the agreement, and to sell the lands. His brother took possession of the land; has cleared about 150 acres of it, and has put \$6000 or \$7000 worth of improvements upon it; the charge in the bill, that the sale to his brother was made to cheat, hinder, and delay payment of his debts, is not true; Mr. Vance attended to the business of the firm of Vance & Andrews; witness knew nothing about it, or its details; McElhenney was clerk of the firm, and book-keeper, during the whole of its existence. He showed witness, about a month before the sale to his brother, a statement of the debts and liabilities of the firm of Vance & Andrews, and of the assets of the firm, and showed a balance of assets of more than \$33,000: witness being cross-examined, said he never did say, to the best of his recollection, that he would not pay the firm debts, or that the sale to his brother was made to gain time.

R. M. McElhenney, a witness for defendant, states that he was book-keeper for Vance & Andrews, from the 10th of October, 1837, till 1st January, 1839; and that he gave Joseph Andrews a statement of the assets and debts of the firm, as shown on the books. The books only showed such debts as were created for the benefit of the firm. The assets of the firm, at their then nominal value, exceeded its debts; how much, witness did not recollect: the firm of Vance & Andrews was liable as indorser, on paper which the books did not show; and does not believe the assets yielded a third of their nominal value. The stock of goods and real estate were sold by the sheriff at a sacrifice, and many debts, then considered good, have since proved worthless.

Richard Abbey, a witness for defendant, thinks \$20 or \$30 per acre for the river land, and \$10 per acre for the hill land, a fair

Pope v. Andrews, et al. •

price, on the terms Joseph sold to Thomas Andrews ; and three of the negro fellows he had noticed, would have sold, on the same terms, at \$1200 or \$1400 each. The land sold could not be put in cultivation, as lands usually are, in less than six or seven years—though it might be cleared, so as to be cultivated, the first year ; and it is worth \$25 or \$30 an acre to clear such land properly.

F. W. Wheeliss, also for defendant, says he was deputy sheriff in Yazoo county, in 1839, and part of 1840, and collected upwards of \$500, that he recollects of, on executions in favor of Vance & Andrews ; there were sundry executions in their favor, but to what amount does not know. Joseph Andrews had control of those executions, and directed the money collected on them to be paid to complainant, who agreed, in the presence of witness, to receive such sums on the execution in his favor.

Charles F. Hamer, for defendants, states that in the fall of 1839, Vance & Andrews transferred to him all the assets of the firm, to collect ; and shortly afterwards directed him, in writing, to pay to Pope all moneys he might collect, until the judgment in favor of Pope was satisfied. Joseph Andrews told witness, the object, in making the transfer to Pope, was to gain time, and to make the assets of the firm pay the debts of the firm ; and that Pope had agreed to give him time, if he would give him such a power ; and witness, in pursuance of these directions, paid Pope from time to time, about \$500, and continued to pay him as he collected money, until he heard of the sale of the land in controversy. On cross-examination, he states that he always thought, from his knowledge of Joseph Andrews's circumstances, that he owed little or nothing on his own account, at the time alluded to. Witness had seen many notes signed by Vance & Andrews as first drawer and surety, amounting, it may be, to \$20,000. Witness was plaintiff's attorney in several suits brought on these notes. Mr. Andrews defended the suits ; pleaded non-assumpsit under oath. Witness introduced proof of the existence of the partnership, but the jury found for Andrews in all the cases tried. Some of the cases were continued, and are still untried. In one case, witness got a verdict ; in it there was no plea ; Mr. Andrews obtained an injunction to that

judgment: Mr. Andrews's means are not now available, as witness understands, his property having been sold on a credit. If his property had been sold for cash, and his debts had been as large as his *apparent liability*, his property would probably have not paid them. About the 1st of October, 1839, Joseph Andrews had a conversation with witness, in reference to the indorsements of Vance & Andrews. He seemed to dislike being sued upon them, very much ; said he thought Mr. Vance had no right to sign his name on any account ; he had always considered the partnership a limited one ; that he was quite sure he was not bound, in law or equity, to pay them ; and would not do so, unless compelled by law. "Witness is not sure, but thinks at one time he understood Mr. Andrews to say, he never would allow his individual means to go to the payment of the debts created by Vance in the name of the firm ; generally he said he would not pay them unless compelled by law ; and witness is not quite sure that he did not always use that qualifying expression" ; that Andrews told him, if the debts of the firm were collected, it would pay all debts, which was all he wished, as he did not desire to take anything from it ; that he was willing to pay the notes originally given in the name of the firm for goods, although Vance had collected the money of the firm, and had agreed to pay these notes ; that he was willing to pay all just claims, but that Vance had used the firm name for gambling, and other purposes, because he knew Andrews was in good credit.

Richard C. Hyatt proved that Joseph Andrews had paid about \$7000, under execution, to the Planters' Bank, on account of the debts of Vance & Andrews, part in Union Bank paper, at par, and part in the notes of others ; that the reason the paper of the Union Bank, and other notes, was taken, was, that the bank had understood that Joseph Andrews had sold out his property, and was returned "*nulla bona*" upon execution, and that if the bank got its money at all, it would be after long delay.

John M. Anderson proves that he knew Thomas Andrews in Mississippi, in 1832 ; he knew him in 1839, and thinks the property he owned in Yazoo county, was then worth, as property was selling, about \$25,000 ; but that it had since greatly declined in value ; what his debts were, he did not know.

Pope v. Andrews, et al. -

Joseph Regan thinks the property of Joseph Andrews, in the spring of 1839, at a cash valuation, was worth \$40,000, at least ; and that he was perfectly able to pay all his debts. In the spring of 1839, he bought about 720 acres of land of Joseph Andrews, for which he was to pay him \$22,000, in three equal annual payments. Joseph Andrews also owned, at that time, two sections of land in Louisiana, which he sold to a Mr. Robinson.

M. B. Hamer states, that in the spring of 1839, Joseph Andrews deposited a note for about \$7000, drawn by Joseph Regan, and others, as collateral security for a note of about \$5500, held by the Commercial Bank, at Manchester ; which note has been paid. Andrews also owed said Bank another note, for about \$4000; and the note of Regan, so deposited, was intended as collateral security for it also ; he has deposited as collateral to the last note, another note for about \$3000. Andrews also paid two other notes, for about \$3000 each, one due two years after 31st January, 1837; the other payable eighteen months after date, but date not recollect. On cross-examination, he states he knew Joseph Andrews was considerably involved by Vance ; heard him say, in the spring of 1839, that Vance had ruined him, which of course impaired his credit, which he would not have deemed sufficient for any considerable amount ; does not know what time may prove about his solvency or insolvency ; knows he has been sued for large sums, as a partner of Vance & Andrews, from a portion of which he had been released—though what amount, witness does not know ; had heard Mr. Andrews say that he would not pay the debts of Vance & Andrews ; that Vance had swindled him.

Henry Hagan proves that the land sold to Thomas Andrews, by his brother, was worth, at the time of sale, about \$27,000; that in the year 1838, he had heard Joseph Andrews express his intention to sell his lands in Mississippi, and move west of the Mississippi river, on account of his bad health ; that Mr. Joseph Andrews's property in Yazoo, other than that sold to his brother, was, in March, 1839, worth upwards of \$22,000 ; that at the time of the taking his deposition, November 18, 1840, Joseph Andrews owned no visible property in Yazoo county ; that his estimate of Andrews's property was formed from his views of its intrinsic value ; that he had

Pope v. Andrews, et al.

not known any land sold since that period, at *one half* the price he had put upon the land.

S. S. Prentiss, for complainants.

By the testimony given in the case, it appears, that at the time of the sale from Joseph to Thomas, Joseph was deeply involved ; *nearly \$50,000*, of pending liabilities are designated by the witnesses. In all probability, much more existed unknown to them.

The law presumes a man to be *aware* of his debts and obligations — and it is therefore a legal presumption, that Joseph Andrews knew of his ; as they have been proved by the witnesses. There is no necessity of bringing home by express proof, to a debtor, the knowledge of the liabilities he has himself contracted.

Even if such necessity existed, it is shown that he knew of them in the spring of 1839, by his complaints to M. B. Hamer, that Vance had ruined him.

In the spring of 1839, just before the sale to his brother, J. Andrews had sold to Regan all the rest of his property, except that embraced in the deed to Thomas, for \$22,000, on one, two, and three years' credit.

What, then, was his intention, when he sold to his brother ? Involved in liabilities to the amount of nearly \$50,000, he sells, on a credit of eleven years, all his visible, tangible property, that could be reached by creditors, retaining nothing whatever that was accessible : neither of the Regan notes due, and nothing to which his creditors could turn for the liquidation of their just claims.

Take these facts in connection with the fact, that the goods of the firm of Vance & Andrews had already (on 1st January, 1839) been seised in execution by the sheriff, and that Andrews was complaining, that Vance had ruined him ; and who can doubt, that the sale to his brother was intended, by him, at least, to delay his creditors ?

That the conveyance of J. Andrews to Thomas embraced all his tangible property in his possession, is proved,

1st. By the return of "*nulla bona*," immediately thereafter, as stated by "Hyatt," in his deposition, on the execution of the Planters' Bank, and in another case, as stated by A. G. Harrison, in his deposition.

2dly. By the evidence of *Dorsey*, who states, that, after selling to *Regan*, he sold out *his other property* to his brother *Thomas*. Also, by *Regan's* testimony, who speaks of his property left, as consisting of perhaps ten acres of land, and a lot belonging to *Vance & Andrews*.

Now, to establish fraud in *Thomas*, or rather a knowledge of it in *Joseph*, it is necessary to look at his situation, and to all the circumstances of the case.

Fraud can seldom be proved positively ; it is to be judged from its badges.

The evidence shows that *Thomas* had been living with his brother for seven or eight years. Is it not natural to presume he knew as much of his brother's situation as strangers ? — of his business — of his liabilities — of the extent of his property ? As to the assets of the partnership of *Vance & Andrews*, there is no proof that they ever yielded more than the paltry \$500, paid over by *C. F. Hamer* to *Pope*. Both defendants acknowledge, in their answers, the utter insolvency of the firm.

Thomas Andrews admits, in his answer, his knowledge of judgments to a considerable amount against his brother, at the time of the conveyance.

The pretences set up for the sale, by both defendants, clearly indicate *fraudulent intent* in the transaction.

The pretence of sale is, that *Joseph* was in ill health ; expected soon to die, and wished to move to another country.

Would a man, expecting soon to die, sell all his property on ten or eleven years' credit ? Would a man, going to another country, sell all his possessions on such credit, and deprive himself of the means of travel, or subsistence ? Besides, what was the fact ? *J. Andrews*, with the exception of two or three months, has been residing all the time with his brother, on the place.

But the *great and conclusive evidence of fraud*, is in the *terms* of the sale, the *enormous credit*, and the provision that the deed of trust shall not take effect till the last note falls due ; a period of eleven years. *This time shocks common sense* ; is *unusual, unnatural, and fraudulent, per se*, upon its face, as to creditors.

The rule upon this subject is not fixed, but depends upon the

Pope v. Andrews, et al.

circumstances of each case ; but in this case, it seems to me there can be no doubt. The very offer to sell, on such credit, should have put the vendee on his guard. It is, of itself, notice of fraud.

That *long time* may be *per se* proof of fraud, *vide* 7 Greenl. 241 ; see also 2 John. C. R. 297 — 304, ib. 43, ib. 48.

If defendant had other property than that embraced in the deed, *he is bound to prove it.* 14 John. 499.

Defendant, Joseph's, deposition cannot be read for two reasons :

1st. He has proceeded to take testimony to sustain the very points to which he deposes ; this cannot be done. 2 Ves. sen. 223.

2d. Because he is charged with fraud, and is interested in the question of costs ; and also in the notes given for the consideration, which could not be recovered, if the sale is set aside in this suit ; for the maker could set up a total failure of consideration. 2 Ves. 628, 629 ; 3 John. C. R. 371 — 613.

I will here mention, as a proof of fraud on the part of Thomas Andrews, the release he has given of all the covenants of the deed. Had the purchaser been *bonâ fide*, he would not, as a sensible man, have given such a release.

Joseph Andrews is directly interested in sustaining the deed, for upon the deed of trust he depends for security of the notes given. If the deed is set aside, the deed of trust falls with it, and he loses his security ; he is therefore directly interested in sustaining the deed.

Wilkinson and Miles, on the same side.

This being a cause of considerable importance, both as it respects the amount of property involved, and the application of legal principles to the facts, as developed by the pleadings and proof, we deem it proper to draw the attention of the Court to the several points most prominently presented.

1st. A judgment creditor has the unquestionable right to levy his execution upon land fraudulently conveyed by his debtor, and, if it becomes necessary for self-protection, to purchase it. As a necessary corollary, it follows, that the purchaser may file his bill in this Court, to have the fraudulent deed of the debtor set aside. Upon the ground, *first*, that fraud vitiates the contract *in toto* ;

Pope v. Andrews, et al.

secondly, that courts of equity entertain jurisdiction to remove clouds from land titles. Dick. Rep. 84; ib. 761; Shep. Touch. 66, 67; 1 John. Cha. Rep. 481, 482; 14 John. Rep. 498.

2d. Notwithstanding the maxim, "fraud will never be presumed," it is now too well settled to be questioned, that fraud *will be presumed*, if the facts of the case justify it; although the defendants positively deny, by their answers, any intention to defraud, hinder, or delay creditors. 1 John. Cha. Rep. 481-487; 2 John. Cha. Rep. 297-304; ib. 43-48; 18 John. Rep. 426; 1 Day's Conn. Rep. 295.

3d. Supposing fraud fixed upon Joseph Andrews, the vendor, and not upon Thomas Andrews, the vendee; what effect will the deed of conveyance have against the claims of the complainant, as a judgment creditor of the vendor? After a careful investigation of the books on this subject, we find it laid down by numerous cases, decided by the brightest ornaments of the English and American Bench, that such a conveyance as this, made and executed under such suspicious circumstances, will not be permitted to stand against the creditors of the vendor. And the deed will be cancelled, though the vendee be a *bona fide* purchaser without notice. 14 Ves. 289, 290; 2 Ves. sen. 627; 1 Dow, 30; Shep. Touch. 66, 67; 2 John. Cha. Rep. 42; 1 Conn. Rep. 527, notes; 7 Cow. 301; 7 John Cha. Rep. 64; 1 Cow. Rep. 632; 7 Greenl. Rep. 241.

4th. Was not the land subject to seizure and sale under execution, by virtue of the provisions of our statute, making estates of every kind holden or possessed in trust, subject to like debts and charges of the person to *whose use* they shall respectively be holden, as they would have been subject to, if those persons had owned the like interest in the things thus holden or possessed, as they own in the uses or trust thereof? H. & H. Dig. 349, § 29.

We will not fatigue the Court by a discussion of the first point made. It is too familiar; and the reasons by which it is sustained are too firmly settled to require illustration or argument. Passing on, we next approach the second point, which, seemingly, is the most formidable in the cause. Now, although the defendants are called on to answer, as to their motives in making this conveyance, and, in

Pope v. Andrews, et al.

response to the bill, have denied all fraud ; it is insisted, that if the facts in the cause prove a fraudulent intent, the Court will adjudge the deed fraudulent, the answers of the defendants to the contrary notwithstanding. For if the *mere denial* of fraud by defendants, is to outweigh facts and circumstances which fasten upon the transaction the marks of covin, deceit, and trick, from which a violent presumption of fraud may legitimately arise, the temptations held out for perjury will be so great, as to deter creditors from seeking redress of their grievances. Without imputing such conduct to the defendants in the present cause, we lay it down as a general rule (subject to few qualifications), that a man, who will swindle or defraud his creditor, will lie, to conceal it ; and, if called upon by bill to disclose matters which would derogate from his standing in the community, and show him off in his true light to the world, to preserve consistency of character, he will seldom fail to add crime to crime, by swearing to the *bona fides* of a transaction which he knows to be clothed with the full dress of unrighteous intrigue.

Fraud will be presumed, if the facts and circumstances of the particular case justify it, in the face of a full and peremptory denial by the answer. It is to be gleaned from *all* the facts and circumstances appertaining to the case under consideration: the *situation* of the vendor and vendee ; the *relation* they occupy towards each other ; the *value* of the property conveyed, and the *price* given, or agreed to be given, for it ; the *mode* and *time* of payment stipulated for ; the *declarations* of the vendor prior to the conveyance, must all be taken together in the estimate ; and if, separately or collectively, they furnish strong and controlling evidence of a fraudulent intent, the Court will so declare it. See cases cited under second head. The bill, answer, and proof show that Joseph Andrews, the *vendor*, was *largely* indebted, at the time this conveyance was made. That it was executed on the eve of the recovery of a large amount of judgments against the vendor ; and that Thomas Andrews, the *vendee*, was not in a condition to justify him in making the purchase at that *peculiar time*. A time when an unparalleled pecuniary embarrassment prevailed ; when a man of princely fortune would scarcely have ventured on such a purchase as did the defendant, Thomas

Pope v. Andrews, et al.

Andrews, almost void of means. The defendants are *brothers*; which, connected with the other facts in the cause, and the universal suspicion thrown by the books over transactions of doubtful honesty, between persons so nearly related, furnishes almost conclusive evidence of a fraudulent intent, on the part of both defendants.

The time of payment stipulated for, furnishes irrefragable evidence of direct fraud, on the part of both defendants. In a cause involving similar facts, where the vendor and vendee were not so intimately related as here, Chancellor Kent adjudged the conveyance fraudulent. 2 John. Cha. Rep. 297 - 304. It will be recollected that in this case, a credit of about ten years is given by the vendor to the vendee, and that little or none of the purchase-money has been paid. 2 John. Cha. Rep. 44; ib. 297; 11 Wend. Rep. 191 - 203, 217; 4 Mason, 225; 1 J. J. Marsh. 226.

The declarations of Joseph Andrews, the *vendor*, prior to the conveyance, prove that his direct intention was to defraud complainant. It is in proof, by two of their own witnesses, M. B. and C. F. Hamer, that Joseph Andrews had frequently declared, "he never would pay the debts of Vance & Andrews." The bill shows that complainant's claim was *one of that class*. It is also proved by C. F. Hamer, that Joseph Andrews told him his object, in making the conveyance, was to "*gain time*." R. C. Hyatt proves (who is one of defendant's witnesses), that he, as Cashier of the Planters' Bank, was constrained to compromise the claims held by the Bank against Joseph Andrews, because he had *sold all his property on a long credit*. Hughes and Harrison, both prove a large and heavy indebtedness on the part of Joseph Andrews, at the time he conveyed his property; and that the sum of \$22,506, was in suit against him, at the time he executed this conveyance. S. G. Matthews proves that the conveyance was made to *protect* Joseph Andrews from the imprudence of Vance.

The deposition of Joseph Andrews has been taken under an order of court; to the reading of which we object. A party charged with making a fraudulent deed, is an incompetent witness to prove the *bona fides* of the transaction. 2 Ves. sen. 628, 629; 3 John. Cha. Rep. 271; ib. 613. The *release* of Joseph, by Thomas Andrews, from all the *covenants* in his deed, in order to make him a *disinterested*-

Pope v. Andrews, et al.

ed witness, shows off this transaction in its original colors, and furnishes controlling evidence of the intention with which it was entered into. Should the *title* to the property fail, the *vendee* will be compelled to pay up all the purchase-money, without any recourse upon the *vendor*. 2 How. Rep. 601—609. If taking a quit-claim deed implies knowledge of a *doubtful* title, much more would a *release* from all covenants in a deed fix the *vendor* with such knowledge.

The *trust deed*, executed by *Thomas Andrews* to *Dorsey & Regan*, gives to *Joseph Andrews* the whole property, as security for the payment of the purchase-money ; which renders *Joseph Andrews* directly interested in the result of the suit, and his deposition is inadmissible on that ground. He is *interested* in sustaining the deed, in order to save the *security*.

Now we ask, if it be possible for a court of equity to uphold a transaction like this, marked as it is, at every step, from its commencement to its termination, with the *strongest indicia of fraud* ?

If the Court shall doubt whether fraud is fastened upon *Thomas Andrews*, the *vendee*, we then rely upon the strength of the cases cited under the 3d head.

But we think it is shown, conclusively, that the entire contract, on the part of *both* defendants, was conceived in fraud, and made its appearance in the world covered with the distinguishing drapery of its original sin. The *vendee* is the brother of the *vendor*; is a man comparatively without means : from the circumstances, must have known of the indebtedness of the *vendor*; and, at a time of such general embarrassment, never would have made such a purchase, unless for the purpose of securing his *brother's* property, in derogation of the rights of his creditors. 4 Raw. Rep. 309.

We next call the Court's attention to a sound and legitimate construction of the act of the legislature before referred to, H. & H. Dig. 349, sec. 29. It is thought, that under the provisions of the act, the land was liable to seizure and sale.

All other positions failing, we then rely upon the case in 1 John. Ch. Rep. 481, as a dernier resort. Under the rule, as there laid down, the Court will compel *Thomas Andrews* to pay up the amount of Pope's judgment, or, in default, order him to convey the premises to Pope.

Pope v. Andrews, et al.

W. Yerger, for the defendants.

The evidence in the cause, to my mind, proves anything else than fraud, even upon Joseph Andrews : though so far as Thomas Andrews is concerned, there is not the slightest pretence that he was guilty of any fraud, or participated in any design to defraud the creditors of Joseph Andrews, if Joseph, even, had such intention. I need scarcely state the rule of equity, that fraud cannot be presumed or inferred from slight circumstances ; although it is admitted that direct proof of fraud need not be adduced.

It may be proved by circumstances, as well as anything else. But where an act does not necessarily import fraud, where it may have occurred as well from good as bad motives, fraud will not be inferred. 8 Peters, 253.

To vitiate a conveyance as fraudulent, there must be a fraudulent design in the grantor, and notice of that design in the grantees. 4 Rand. 282 ; 4 Wheaton, 466 ; 9 Yerger, 327 ; 8 Peters, R. 253 ; Baldwin's C. C. R. 110 ; 3 John. Ch. R. 378 ; 14 John. R. 498 ; Howard & Hutch. Dig. 370, 371.

In the case before the Court, it would be necessary for the Court to indulge two presumptions, before it could set aside this sale. First : it will have to presume that Joseph Andrews intended a fraud ; and, secondly : that Thomas Andrews, being cognizant of such intention, participated in it, by making the trade. Upon looking at the facts, I do not think that they are sufficient to raise the first presumption. I am sure they do not warrant the second.

In order to raise a presumption of fraud, "it is not sufficient that the fact to be inferred often accompanies the fact proven ; it should *most usually accompany* it : and I would say, in the absence of all circumstances, that it should *rarely otherwise happen.*" *Hart v. Newland*, 3 Hawks, R. 122 ; *Pattershall v. Lurford*, 23 Eng. L. R. 214 ; 2 Phil. Ev. New ed. 289, et seq.; 1 Phil. Ev. New ed. 504.

After every effort to establish fraud, if it remains doubtful upon the proof, innocence is to be presumed. 2 Phil. Ev. New ed. 298 ; 1 Rep. Const. Ct. 308, 309 ; 1 Wash. 306, 308 ; 3 Cases Ch. 85, 114.

It is objected, that Joseph Andrews is not a competent witness

Pope v. Andrews, et al.

for Thomas Andrews. His interest is clearly against Thomas Andrews, and in favor of the complainant; and the fact that he is charged as a *particeps fraudis* does not exclude him. 6 John. R. 135; 1 Rawle, 141; 9 Pick. 139, ib. 176; 11 Mass. R. 498; 2 Phil. Ev. new ed. 70, ib. 120; 4 J. J. Marsh. 86; 7 Wend. 229; 2 Gill & John. 132.

By the CHANCELLOR. This bill is filed for the purpose of setting aside a deed from Joseph Andrews to his brother, Thomas Andrews, of certain lands in the county of Yazoo, dated the 4th March, 1839. The complainant claims those lands as a purchaser, under a judgment rendered in his own favor, in May, 1839, against Joseph Andrews and James H. Vance; and alleges that the deed from Joseph to Thomas Andrews, was made to "delay, hinder, and defraud" his creditors; and prays that the same, as to him, may be declared fraudulent and void. The answers deny all fraud, and insist that the sale to Thomas Andrews was made in good faith, and for a valuable consideration. I am to decide upon the issue thus made: 1. Whether there was fraud on the part of Joseph Andrews: and, 2. Whether Thomas Andrews knew of, or participated in, that fraud.

The prosecution of these inquiries, demands a critical and searching examination of the various facts and circumstances disclosed by the pleadings and proofs, in order that the motives and influences which led to the sale may be fully seen and understood.

1. It appears that one James Vance and Joseph Andrews, were engaged as partners in the business of merchandising; that Vance was the active partner, and had, from want of skill, or from neglect, or other cause, so managed the affairs of the partnership, that, by the spring of 1839, the concern had become greatly embarrassed, was harassed with lawsuits, for large sums of money, and threatened with immediate and hopeless insolvency. Joseph Andrews, being advised of this state of things, became alarmed for the safety of his individual property, and declared to his friends, about that time, and *afterwards*, that he would never pay any of the debts of the partnership; that he had been swindled and ruined by Vance, and that none of his individual means should ever be applied to the payment of their joint debts. These facts and declarations are fully proven by C. F. and M.

Pope v. Andrews, et al.

B. Hamer, two of the defendant's own witnesses. In consummation of the purposes, thus avowed by Joseph Andrews, I find him, in quick succession, conveying away all, or nearly all, of his visible and tangible property, and divesting himself of everything upon which an execution at law could be made to act. How well he accomplished his design, is fully shown by the fact, that executions upon all judgments, subsequently obtained against him, were returned "no property found."

2. There is something in the very terms and character of the sale to Thomas Andrews, which, when viewed in connection with the heavy embarrassments of the firm of Andrews & Vance, and the declaration of Joseph Andrews, that he would never pay any of their debts, furnishes to my mind the most convincing proof of the true character of the transaction. 1. It is proven, that Thomas Andrews was a mechanic, with but a small property, and limited resources, and yet, by the sale, he contracted a debt for upwards of sixty-five thousand dollars ; an amount vastly beyond what he could pay, by the aid of his limited means ; but still we find Joseph Andrews entirely willing to rely upon no other security, than that of a deed of trust upon the same property which he sold to him ; and this, too, although it appears that much of the property embraced by the deed is of a perishable nature, and must become extinct long before the period at which the heaviest portions of the debt are to mature. 2. Upwards of sixty thousand dollars of this debt is divided into three equal instalments, and made to mature nine, ten, and eleven years after the date of the contract, with a proviso in the deed of trust, that it should not be enforced until the last payment fell due ; thus, in point of fact, extending the credit to eleven years. This extravagant credit is rendered more remarkable, when it is recollected that it was given by one in great need of ready means, to meet heavy impending liabilities, and to one whose limited resources furnished but a flimsy assurance that the debt would ever be paid. I think, that a sale upon such a credit, by one largely in debt, and whose every means were more than demanded to meet his then existing and pressing wants, is wholly irreconcilable with the conduct of an honest debtor ; and can only be accounted for upon

Pope v. Andrews, et al.

the hypothesis, that the sale was made, in the language of the statute, "with intention to hinder, delay, and defraud creditors." From this view of the case I cannot doubt, that so far, at least, as Joseph Andrews was concerned, the sale was intended to lock his property against the legal pursuit of his creditors, and at the same time admit him to the secret enjoyment of the profits thereof. It placed it in his power to postpone his creditors for eleven years, and then to pay them, or not, at his pleasure. 3. This brings me to the second branch of the inquiry ; Was Thomas Andrews privy to the alleged fraud ? If he was not, then he stands fortified and protected by the provision of our statute, as a purchaser for valuable consideration, however fraudulent may have been the intention of his grantor. The counsel for the defendants insist, that there is no evidence in the case, establishing any such privity. It very rarely happens, that direct evidence of fraud can be obtained, it is usually elicited from the facts and circumstances attending each case. It is generally true, that the first effort of a man who intends to commit a fraud, is to throw a veil over the transaction, which may shield it against assault, and baffle all attempt at detection. No man willingly furnishes the evidence of his own turpitude. It is equally true, that the very means, which are carefully used to impress the transaction with outward fairness, not unfrequently serve to expose its inward deformity and turpitude. The difficulty of obtaining direct evidence in such cases, has led to the rule in equity, that fraud may be inferred, from facts and circumstances, — such as the nature of the contract, and the relation and circumstances of the parties. *Chesterfield v. Janssen*, 3 Ves. sen. 155 ; *Denton v. Mackenzie*, 1 Desauss. Rep. 300 ; *Gist v. Frazier*, 2 Littell's Rep. 118 ; *Watkins v. Stockett*, 6 Har. & Johns. Rep. 435.

I infer that Thomas Andrews was privy to the fraud intended by Joseph Andrews.

1. Because they were brothers, living in the same neighborhood, and sometimes together, and were likely, therefore, to be familiar with each others circumstances, and to share each others confidence. 2. Because the embarrassments of Joseph Andrews, as a member of the firm of Vance & Andrews, appear to have been

a matter of neighborhood notoriety, of which Joseph Andrews, himself, frequently spoke to others ; avowing his determination never to pay, out of his property, any of their debts ; and I am not at liberty to suppose that he did not make similar avowals to his brother, in whom he appears to have had the utmost confidence, or that the same facts were not known to him, that appear to have been familiar to others. 3. Because he shows in his answer, that he was aware of the heavy indebtedness of his brother Joseph ; and he must have known, from the very nature of the long credit given to him on the sale, that it was the purpose of Joseph, to thus carry out his previously avowed intention of never paying the debts of the firm of Vance & Andrews ; because he must have seen that Joseph was thus divesting himself of all the means which he had, by which either a voluntary or forced payment could be made. Taking all these circumstances together, I think they countervail the denials of the answer, and prove that the sale was made with a fraudulent intent. I have not noticed the deposition of Joseph Andrews, because I am satisfied that he is an incompetent witness. 1. Because a defendant who is charged with colluding with his co-defendant, in regard to the transaction sought to be impeached, cannot be a witness for his co-defendant, especially where he is liable for costs, as Joseph Andrews evidently is, in this case. *Whipple v. Lansing*, 3 Johns. Ch. Rep. 612 ; 2 Ves. sen. 628, 629.

2. Because Joseph Andrews is directly interested in upholding the sale ; for, if it is set aside, he must lose all right upon his deed of trust, and to enforce the payment of the notes, taken as the consideration of that sale. Upon the whole, I shall declare the deed from Joseph Andrews to Thomas Andrews, so far as it relates to the land, fraudulent and void as against the complainant. And shall direct the costs of the suit to be paid by the defendants. Let a decree be prepared accordingly.

DECEMBER TERM, 1843.

HEIRS OF CHARLES LAND v. HEIRS OF THOMAS LAND.

The fact that both parties to a suit in chancery in the State courts, claim the land in controversy, under a treaty to which the United States is a party, has, in itself, nothing to exclude the jurisdiction of the State court.

The refusal of the agent of the United States, residing with the Indians, to register the application of the Indians, claiming under the 14th article of the Dancing Rabbit Creek treaty, does not affect the validity of the claim and application of such Indians.

The right of the head of a Choctaw family to a reservation under the 14th article of the Dancing Rabbit Creek treaty, *vested* whenever such Choctaw signified his intention, to the agent of the United States, of becoming a citizen of the State; and that right became *complete* whenever a residence on the land, for five years subsequent to the ratification of the treaty, was accomplished.

THIS bill is filed by the heirs of Charles Land, and charges that their ancestor purchased from Betsey Beames, or Istanchi, her reservation under the 14th "article of the Treaty of Dancing Rabbit Creek," for eight hundred dollars, and took title therefor, and power of attorney to prosecute the claim. The former is lost or mislaid. The latter is filed, as an exhibit to the bill. That said Indian was the Choctaw head of a family, and had one unmarried child, living with her, over two years of age, who is since intermarried with the defendant Thomas Sims. That Istanchi resided upon Honey Island at the date of the treaty, within the district ceded by the treaty, and had a house and field on the tract, which, after the survey of the land, proved to be section 21, township 16, range 1, west. That, within six months from the ratification of the treaty, she signified her intention to Col. William Ward, agent of the United States for the Choctaws, of becoming a citizen, and taking lands, under the 14th article; claiming for herself, in consequence of her improvements and residence, said section, and the west half of number 22, for her daughter. That she remained upon said land until 1831, when, having once been compelled to move her house to a different part of the tract by Thomas Land, she was driven off, and her house taken possession of by one Fatharee, and after his removal was filled with corn and fodder. That the year after, as soon as the corn and fodder were removed, and the house

Land v. Land.

left vacant, she took possession, and continued in possession until his death, which happened in December, 1836. That although much annoyed, and for a time compelled to leave her house, she always claimed it for her home. That Sims, and his wife Ann, sold, and transferred by quitclaim, all their interest, to Jno. B. Forester. That Forester's claim forms a cloud upon their title. That Sims and his wife, and Forester, all knew of the prior purchase of said land by their ancestor. That the east half of said section 21 was located by a floating claim, in the name of Josiah Doak. That Doak was a white man, and trader, and lived thirty miles from the place. That a float was granted to him, by a supplement to the treaty, for a half section, to be located upon any unoccupied and unimproved lands in the district in which he lived. That, without locating the float, he sold it to _____, who sold it to Thomas Land, deceased, who located the same, in the name of Doak, upon the said east half of section 21, which embraced all Istanchi's improvements, with full knowledge of her claim, and of the sale she had made to Charles Land, and Thomas Land took immediate possession of said land, and retained it until he died, which was in June, 1839, since which his legal representatives have had possession and received the profits, which are worth from \$500 to \$1000 per annum, as there are two hundred acres of cleared land. Charges that the legal representatives are bound to account to them for the same.

Charges that defendant Johnson was appointed administrator of Thomas Land ; that he received the profits, and applied them to the use of the estate, which is insolvent ; that said administrator threatens to sell said half section, and appropriate it to the use of the estate ; that if he is permitted to do so it will embarrass their title. Asks a restraining order, and that he be charged with the rents and profits ; that this claim throws a shadow of suspicion or cloud upon their title ; that Charles Land died on the 28th July, 1834, leaving a will, directing his executors to sell all his real estate to pay his debts ; that complainants are his only heirs and legal representatives ; that the above claims throw a cloud upon the titles, and greatly embarrass the sale, of said real estate. Prays that the title be vested in them, clouds removed, for an account with John-

son, and a sale of the float to pay whatever is due them, as the estate is insolvent ; that the title to the land in controversy be vested in them by conveyance from Thomas Land's heirs, and injunction against Johnson, and general relief.

The answer of Thomas Land's heirs, Johnson Cyrus Land (by his guardian *ad litem*), and William Land, states, that they have no personal knowledge of the sale by Betsey Beames, or Istanchi, to Charles Land, but they have heard of it, and demand proof ; that Istanchi was the Choctaw head of a family, at the time of the treaty, as they believe, and that she applied to Ward to have her name registered, which he refused to do. They deny that Thomas Land drove her off his place ; say that Fatharee threatened her, which induced her to leave. Admit that Charles Land took possession of said east half section 21, under the location of Doak. They charge that Istanchi voluntarily left the place, and that she never resided there after 1835. They say, that the representatives of Charles Land, before Thomas Land deceased located Doak's claim, said that they had despaired prosecuting with success the claim of Istanchi ; that, in consequence of that statement, Doak's claim was located there ; that, at the time of the location, Doak's claim was the only valid claim ; they admit that Istanchi was entitled to land under the 14th article of said treaty, but allege that she cannot interfere with the title of Doak, derived from the same treaty. Admit that Thomas Land cultivated until his death, in 1839, and Johnson until 1842. Think the rents and profits worth \$2 per acre. That valuable improvements were made. Johnson says, that he never heard of the claim being set up, while he cultivated, until he advertised it for sale. Allege that 16th section of said township was reserved for said Istanchi, and exhibit the Register's certificate that it is still vacant. They deny fraud. Insist by way of demurrer, as if specially pleaded.

The answer of Thomas Sims and wife, admits the allegations of the bill, except the sale to Charles Land of the west half of section 22, which they positively deny. Admit their sale to Forester, and a quitclaim title to their interest in both sections 21 and 22.

The answer of Jno. B. Forester, admits, from belief, the general

Land v. Land.

allegations of the bill, except the sale of west half of section 22, to Charles Land, which he claims, as a purchaser from Sims and wife. Disclaims all interest in said section 21, although the deed from Sims and wife vested the legal title in him. Prays his answer may be taken as a cross-bill against the heirs of Charles Land, deceased, complainants. Calls on them for an answer, which is filed, admitting that Charles Land purchased only section 21, and that he never purchased, nor had any claim to, said half of section number 22, or any other half section, on account of said daughter of Istanchi.

The depositions fully establish the allegations of the bill. It was admitted by counsel that Ward was the agent of the United States for the Choctaw nation during the year 1831, and that Josiah Doak did not live on the land in controversy, either at the treaty or since, nor did he ever have any improvements on the same.

The Register's certificate, referred to in the answer of the defendants as exhibiting a reservation of the 16th section of the same township for Istanchi, recited that the reservation was merely *conditional*, and that the same section was afterwards unconditionally reserved for Ne-te-ka-chee, a chief; which last reservation was approved by the President of the United States on the 3d of June, 1836.

S. S. Prentiss, for complainants.

The bill in this case is framed upon a claim set up by complainants to section 21, township 16, range 1, west, and the north half section 22, in same section and range. This claim is derived through Betsey Beames, a Choctaw head of a family, from the 14th article of "The Dancing Rabbit treaty." It is averred that Betsey Beames was entitled, under said 14th article, to said section 21, as the place of her residence at the time of the treaty, and to the one half of section 22, on account of her child, then near 10 years of age. It is averred that Charles Land purchased, for a good and valuable consideration, her title and interest, and that the bond of title is lost. The bill further states, that one half of section 21 is claimed by the heirs of Thomas Land, under a purchase from one Doak, who floated upon it, and that John B. Forester

Land v. Land.

claims by purchase from one Sims and wife (which wife was Betsey Beames's daughter), said one half of section 22. The complainants abandon their claim to the one half of section 22, and insist upon a decree for quieting and confirming their title to section 21.

The evidence in the case is full and conclusive. 1st. That Betsey Beames was a Choctaw head of a family, and resided, and had an improvement at the time of the treaty, upon said section 21, in controversy.

2d. That she signified within six months after the treaty to Ward, the U. S. agent for that purpose, her intention of remaining and becoming a citizen, under the 14th art. of the treaty.

3d. That she resided on said improvement, in sec. 21, according to the provision of said 14th article, for five years and more, even till her death in December, 1836.

4th. That Betsey Beames sold to Charles Land her claim, for a negro, and an agreement to support her for life; that said contract was in writing, Betsey Beames giving said Charles Land a bond for title, and he delivering the negro and giving a bill of sale. All these facts are distinctly and plainly proven, by the depositions of Jonathan Revill, David D. Thomson, and Thomas Sims; there is also a written admission by defendants' counsel, that Ward was the proper agent of the United States, to whom the Indians were to signify their intention of remaining.

Upon this state of facts, it seems to me to need no argument, to show that complainants have a complete equitable title to sec. 21, through Charles Land's purchase from Betsey Beames.

Betsey Beames acquired, by her residence on sec. 21, at the time of the treaty, her signification of intention to remain within six months, and her actual subsequent residence for five years, a complete legal title, under the treaty. It was, from the moment of signification of intention, a complete legal title, subject only to be defeated by a failure to perform the condition subsequent, of a residence of five years.

As to the character of Betsey Beames's title, see 5 Yerger, 323; 2 Yerger, 432; also, *Newman v. Doe, ex dem. Harris et al.*, 4 Howard, 522. In this latter case, the construction of this very 14th article, is given fully, and the character of title, derived under it, determined.

Land v. Land.

A removal before the expiration of the five years even, if involuntary, or caused by the threats or acts of others, will not constitute a forfeiture. 2 Yerger, 432, 438, 450; 5 Yerger, 343; 7 Yerger, 46; 8 Yerger, 461.

Doak's float, under which Thomas Land's heirs claim, was authorized to be located only on *unoccupied* and *unimproved* land; sec. 21, was both occupied and improved. Complainants ask for a decree, compelling Sims and wife to execute a quitclaim deed in fee simple to them, of sec. 21, in pursuance of the *bond for title*, given to Betsey Beames, the legal title having descended to Mrs. Sims, the sole child and heir of said Betsey, also a decree for account against Thomas Land's estate, and for possession of the lands, and quieting the claim set up by Thomas Land's heirs.

Complainants consent that a decree may be rendered in favor of J. B. Forester, for the portion of section 22 claimed by him in his cross-bill.

Brooke, for defendants.

The answer insists, by way of demurrer, on the insufficiency of the bill; this point will be noticed first. The demurrer is intended to apply to a want of jurisdiction of this Court, which, it is contended, exists. 1st. Because the case is one which arises under a treaty of the United States; and, therefore, cognizable only by the tribunals of the United States. 2dly. Because the acts of the U. S. agent, in refusing the application of the Indian, under whom complainants claim, and granting the reservation of the land in question, to the person under whom defendants claim, are judicial acts; performed by one of competent authority, and, therefore, not to be collaterally questioned, except for fraud.

1st. What is, or is not, a case arising under a treaty? For it is conceded that there are many instances of cases, wherein title may be derived from, or under, a treaty; and yet that title be recognized and protected in a State court. We conceive the rule of distinction to be this—Where the State court is called upon merely to decide upon the existence of facts, which constitute or give title under a treaty, and there is no officer or tribunal nominated in the treaty, to perform that duty, prior to the issuance of a

Land v. Land.

grant, then such court may well exercise jurisdiction, or in cases where one party claims under a State law. If, for instance, the 14th article of the Choctaw treaty, merely provided, that a residence by an Indian, of one, two, or three years, should confer title on him to any portion of the ceded territory; a State court, should the question arise before it, might inquire as to the fact of residence, and decide whether or not a title under the treaty had accrued. But, where the facts being admitted, the question arises, whether, under a particular construction of the treaty, such facts come within its provisions, it is conceived, that the federal courts alone are competent to decide; such is the case at bar. The question at issue rests wholly on the construction to be given to the 14th article of the treaty of Dancing Rabbit Creek; and both parties, as is shown by the bill, rest their claim upon it, and upon it alone. The judicial power of the United States Court is (Const. U. S. art. 3, § 2,) extended to all cases arising under treaties made, or to be made, under the authority of the U. S. In the case of *Chisholm v. The State of Geo.* (2 Dall. 419–475), Chief Justice Jay vindicates the exclusive jurisdiction of the United States courts in such cases, on the ground that, “because treaties are compacts made and obligatory on the whole nation, their operation ought not to be affected or regulated by the local laws or courts of a part of the nation.” In *Owings v. Norwood*, lessee (5 Cranch, 348), Judge Marshall remarks, “that wherever a right grows out of, or is protected by a treaty, it is sanctioned against all the laws and judicial decisions of the States; and, whoever may have this right, it is to be protected.”

It is not easy to conceive of a case coming more fully within the reasons of the decisions quoted, than the one at bar. The question the Court is called upon to decide, is not, whether certain acts were, or were not, performed by complainants' grantor, so as to entitle her to a particular reservation; but whether, by construction, the treaty does extend to her; when, as is conceded, her name was not registered by the proper officer, as an Indian head of a family, as the terms of the treaty especially require. The fact, that both the parties to this suit claim under the Choctaw treaty, is one

Land v. Land.

much relied upon in this view of the case ; were it otherwise — did one of the parties claim under a State law, adverse to the treaty, this case might be classed among those, in which an appeal lies from a State, to the federal tribunals. The law giving the federal appellate courts jurisdiction in certain cases of appeal from State courts, shows, in its terms, that this is the class of cases referred to, viz. : cases where there is a conflict between a State law and a law of the United States.

By the 25th section of the Judiciary act (L. U. S. vol. 2, p. 65), an appeal from a State court lies to the Supreme Court of the United States ; where the validity of a treaty, or of an authority exercised under the United States, *and the decision* (in the State court), *is against the validity of such statute, treaty, or authority, &c.* The restriction here annexed, shows, that those cases involving treaties or laws of the United States, were alone contemplated as being cognizable in a State court (subject to appeal to the Supreme Court of the United States), wherein only one of the parties claim under such treaty, or laws. For where a State law, and a law of the United States, come in conflict, a State court may properly assume jurisdiction, subject, however, to the appellate power of the United States Court ; the laws of the United States being supreme over those of the States. And this appellate power is given to protect the laws of the United States from what might be apprehended from a too partial leaning of a State tribunal towards its own laws, when they might come before it; in conflict with the laws of another power. But where the conflict comes not between the laws of the State and a foreign power, but between two different constructions of a law of this foreign power ; the reason for the court of any power other than that, that made the law, assuming jurisdiction, does not and cannot exist, where there are courts deriving their authority from the said law-making power. It is presumed, that this Court will not attempt to decide upon rights, or to vest the same, where its decision may be nullified, and those rights divested, by a legislative or executive act, deriving its authority wholly from another independent government ; yet, such might and possibly would be the result in this case, inasmuch as action by Congress is contemplated on the subject of the con-

Land v. Land.

flicting claims arising under the Choctaw treaty — action, which might entirely set at nought any direction or construction, that a State court might give to said treaty. This consideration, alone, should furnish a weighty reason why this Court should decline interference with the subject.

It may be argued on the other side, that, although this is a case arising under a treaty or law of the United States ; that yet, the State courts may exercise a jurisdiction concurrent with the federal. Concurrent jurisdiction is granted to the State courts by act of Congress in particular cases, and by no construction of that act can we extend its provisions to this case. The cases enumerated in that act, are as follows : (See L. U. S. vol. 2, p. 56, § 11.)

Suits of a civil nature at common law or equity, when the matter in dispute exceeds, exclusive of costs, the sum of \$500.

- 1st. Where the United States are plaintiffs.
- 2d. Where an alien is a party.
- 3d. Where the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

These are cases where the jurisdiction depends upon the character of the parties. There are other cases wherein the concurrent jurisdiction depends upon the subject-matter. These are determined by act of Congress ; March 8th, 1806 ; April 21, 1808 ; March 3, 1815 (see the cases enumerated, 1 Kent. 306), and also by the Judiciary act of 1789. They are cases arising under the revenue laws, and of such like nature ; and have no relation to a case of the kind at bar.

On this subject, see 2 Dall. 419, 475 ; 5 Cranch, 344 ; 1 Wheat. 355 ; 1 Kent. 306, 400 ; Conkl. Treatise of the Federal Judiciary, 8, 52, 92.

The result of the inquiry, then, on this subject, may be said to be this :—1. That where both parties claim under a State law, a State court has exclusive jurisdiction. 2. Where one party claims under a State law, and the other under a law or treaty of the United States, the State courts have a concurrent jurisdiction with the federal, subject to a right of appeal to the latter. 3. Where both parties claim under a law or treaty of the United States, the United States courts alone have jurisdiction.

Land v. Land.

2. It is contended that the agent appointed by the United States, for carrying out the provisions of the treaty of Dancing Rabbit Creek, was, *pro hac vice*, a judicial officer, and his acts not to be questioned collaterally by any court, except for fraud, which is not here alleged.

In a provision of the Cherokee treaty of 1817, 1819, similar to the 14th article of the treaty in question, in a case in Tennessee. 5 Yerger, 323, it was held, that the registry of the name with the agent, was conclusive evidence that the individual was an Indian head of family; *e converso*, the refusal of the agent to register, must be conclusive evidence that the individual had failed to establish a claim to that character.

The treaty having appointed the agent for this purpose, he must be trusted as far as he acts under the authority conferred. He was not authorized to register any but Choctaw heads of families, and it is to be presumed he did his duty. 4 How. 554, 555; see also 1 Pet. 412; 13 Pet. 511; 12 Pet. 412. The agent in this case is distinguishable from that appointed by the Chickasaw treaty, and referred to in 5 How. 385. The Court there properly decreed, that he was a mere ministerial officer, his duty being merely to certify to a particular fact; the power to judge or approve, on that certificate, being vested in the President.

But in this case, the agent was required to determine, himself, whether or not the applicant for the benefits of the 14th article of the treaty, was an Indian head of family. He was required to register only the names of such persons; and, of course, was vested with the power of judging whether the applicant answered this description.

The decision of a tribunal having jurisdiction over the matter can never be questioned, collaterally or incidentally, except for fraud: but a defect of jurisdiction may be noticed, whenever and wherever it appears. 1 Howard, 440; 6 Wheat. 128; 8 Cranch, 21; 2 Peters, 164; 1 Saund. 313; 1 Strange, 703; 2 ib. 102, 996.

Since the foregoing remarks were written, the act of Congress, passed August 23, 1842, on the subject of the conflicting claims arising under the 14th article of the treaty of Dancing Rabbit Creek, has been published, to which the counsel begs leave to refer the

Land v. Land.

Court. All jurisdiction of the State courts over the subject-matter, if any existed, is of course taken away by this act.

In the bill, the date of the assignment by Istanchi to complainant's father, is left blank ; but if properly filled up, it would be shown that said assignment was made long prior to the expiration of five years from the date of the treaty. By the 9th section of the act referred to, such an assignment is void.

The counsel herewith submits to the Court a newspaper-copy of said act, which, it is presumed, is correct.

By further reference to said act, it will be seen that the complainants do not, in other respects, bring themselves within the provisions thereof.

See sec. 3d. If it is sufficiently proven that Istanchi, or Betsey Beames, made application in time to have her name registered, yet the defendants contend that the location of Doak on the land, is such a disposition of it by the United States, or by its authority, as will preclude the complainants, by the terms of said 3d section. There are various other requisitions in said section, which are not shown to have been complied with ; and, therefore, this Court cannot undertake to do what the special commissioners of the United States cannot do. See, particularly, said sec. 3, of said law : see also secs. 8 and 9.

CHANCELLOR. The complainants, as the heirs of Charles Land, deceased, claim title to a tract of land, situate within the Choctaw District, in this State ; being section No. 21, in township 16, range 1, west. They show that the title is derived through their ancestor, by purchase from an Indian woman by the name of Istanchi, alias Betsey Beames, who, as the head of a Choctaw family, claimed title to the land, under the provisions of the 14th article of the Dancing Rabbit Creek treaty, concluded between the United States and the Choctaw tribe of Indians, on the 27th day of September, 1830 : she sold to Charles Land, and gave her bond to make title as soon as her title was perfected under the terms of the treaty. By the article referred to, each head of a Choctaw family, desiring to become a citizen of the State, by signifying such intention to the agent of the United States, within six months from

Land v. Land.

the ratification of the treaty, became entitled to a section of land, for which a grant in fee simple was to be issued, after a residence of five years thereon. The testimony in the case, proves the continued residence of Istanchi upon section 21, for the period of five years ; and establishes a compliance, on her part, with all the requirements of the treaty necessary to perfect her title to the land. The complainants set up title to the east half of said section, under a location of what is commonly called a *floating claim*, made in the name of Josiah Doak, to whom a right is given by the supplement to said treaty, of locating a half section of land, upon any *unoccupied* and *unimproved* land in the district where he lived. The complainants pray that the representatives of Thomas Land may be compelled to relinquish to them all title acquired under the location of said *floating* claim, and that Sims and wife may convey, by quitclaim deed, all the title to said section which descended to them as the heirs of Istanchi. As the allegations of the bill are fully sustained by the proofs, the mere question of title between the parties seems to be the leading question for decision. The defendants insist that the Court can give no relief in this case : 1. Because it arises under a treaty made by the United States with the Indians, both parties claiming under that treaty; that the case is, therefore, exclusively cognizable in the courts of the United States. 2. It is insisted, that the refusal of the agent residing with the Indians to register the application of Istanchi, was final and conclusive upon her rights, as a judicial act, and cannot be questioned in this Court.

1. I do not think that there is anything in the first point made by the defendant. The fact that both parties claim title under a treaty to which the United States is a party, has nothing in itself to exclude the jurisdiction of this Court. Although the 2d section of the 3d article of the Constitution of the United States declares, that the judicial power shall extend to all cases, in law or equity, arising under treaties made by their authority, yet it does not confer exclusive jurisdiction upon the federal courts, in all such cases. The mere fact that the rights of the parties to the land in controversy grew out of a treaty, cannot have the effect of ousting the jurisdic-

tion of the Court, when both parties, and the subject-matter of the suit, are otherwise completely within its cognizance.

This is a mere matter of private litigation between citizens of the same State, relating to a subject within the ordinary jurisdiction of a court of equity, involving no question affecting the public, or touching the relation of either of the contracting parties to the treaty. I find nothing in the nature of the claims of the parties litigant, or in the source from which they are derived, which confers exclusive jurisdiction on the federal courts. The 25th section of the judiciary act of 1789, furnishes a legislative exposition of the 2d section of the 3d art. of the constitution, directly opposed to that now urged for the defendants in this case. That act provides, that the judgments of the highest court of a State, in which was drawn in question the construction of any clause of a treaty, where the decision is against the title of either party, set up under the treaty, such decision may be reexamined, reversed, or affirmed by the Supreme Court of the United States. Thus it appears, that the right of a State court to take original jurisdiction of a question of private right, growing out of a treaty, was fully recognized by the very government that is supposed to forbid it. 2. As to the second objection, I see nothing in the terms of the treaty, which clothed the Choctaw agent with such power and discretion as is here claimed for him. I do not find that the right of an Indian to the contemplated reservations, under the treaty, is made to depend finally, and conclusively, upon any lawless discretion, or arbitrary caprice, which the agent might choose to play off, in regard to them. The conditions upon which such right is made to rest, are embodied in the treaty itself, and could not be impaired, restricted, or modified by the mere will of the agent, or of any other power. The right to a reservation depended upon the fact, that Istanchi was the head of a Choctaw family, and that she "*signified*" her intention to the agent, of becoming a citizen of the State. Upon such application her right vested, and became complete and perfect, after a residence upon the land of five years, subsequent to the ratification of the treaty ; and the abstract right was not rendered the less perfect, by the refusal of the agent to register her name, and application. It was

his duty to register the application ; but his arbitrary refusal, or wanton neglect, to comply with his duty, could not have the effect of divesting a right accruing under the treaty, which had thus been in part distinct from, and independent of, his sanction. His duties were those of a mere recorder, and were purely ministerial in their character, having nothing of the conclusive attributes of a judicial sentence. Here it is in evidence, that the Indian woman applied, through her agent, to be registered according to the terms of the treaty, and the agent refused to note the application, saying she ought to go west of the Mississippi river. If this refusal was sufficient to exclude her claim, then it was perfectly within his power to defeat one of the most important parts of the treaty. Even if the powers of the agent were judicial and conclusive in their character, still his conduct, in reference to this claim, could in nowise affect its validity, because the sentence or judgment of a judicial tribunal, is only conclusive upon the matter actually considered and adjudged. But here nothing was decided, but simply a refusal to take cognizance of the application. Upon the whole, I shall direct a decree, declaring the complainants entitled to the section of land, No. 21, and appointing a commissioner, to convey to them all the title thereto, acquired by the representatives of Thomas Land, through the *float* located in the name of Josiah Doak, as also all the title which Sims and wife acquired thereto, by descent, as the heirs of Istanchi. The bill must be dismissed as to Forster ; the complainants having acquired no title by their purchase from Istanchi to the land reserved by the treaty to her daughter.

DECEMBER TERM, 1843.

JOHN B. STEGER, ADMINISTRATOR, &c. OF HARRY LONG v.
JAMES BUSH, et al.

An administrator, in selling the property of his intestate, must follow strictly the mode pointed out by the statutes on that subject.

Where the statute regulating sales of estates of deceased persons, requires the administrator to take of the purchaser, "*bond with approved security*"; *held*, that the *bond of the purchaser*, and not the transfer of the note of any third person, was contemplated by the law.

An administrator sold property of his intestate, and took of the purchaser his bond for the payment, and also the note of a third person, and agreed to collect the proceeds of that note, and apply them to the payment of the purchaser's bond; *held*, that no neglect on the part of the administrator, to collect the note, and the consequent loss thereby, could have the effect of relieving the purchaser from the payment of his bond, or of discharging the statutory mortgage thereon.

In such case, the administrator would be regarded as the agent of the purchaser *quoad hoc*, the collecting the note, and not of the estate.

A party who receives from his debtor the note of a third person, as collateral security for his own debt, is bound to use due diligence in collecting it; and if it is lost, by any delay of his, he becomes responsible for the amount.

A mere delay to prosecute the collection, unaccompanied by consequent loss, will not render the creditor responsible.

Where a creditor, having sued upon collateral paper, granted a stay of execution for six months, upon the judgment; *held*, that the stay is not such delay, unless it is the occasion of the loss of the debt, as will render the creditor responsible for the amount of the collateral paper.

THE complainant, administrator *de bonis non* of Harry Long, deceased, by his bill alleges, that in November, 1837, Howell Hobbs, who was the then administrator of his intestate, having obtained an order from the Probate Court, sold the negroes belonging to the estate, and Joseph Gold became the purchaser of Ben, Jim, and boy, and gave his note for the purchase-money, three hundred dollars of which only had been paid; that said negroes were in the possession of the defendant Perry or Strother, and prays that the negroes be subjected, under the statutory mortgage, to the payment of the sum yet due for said negroes, and for general relief.

The defendant James Bush, who is the administrator of Gold, files his answer, in which he denies that Gold became the purchaser of the negroes, but the name of Gold was used to bid them

off, together with another negro since dead, for the benefit of Andrew T. Perry, now deceased. After the negroes were bid off, in order to carry out an agreement between said Perry and the administrator Hobbs, Perry assigned to Hobbs two notes, as follows, to wit : one for two thousand dollars, made by Jesse Andrews, and indorsed by N. W. Hatch and John A. Cotton, dated 12th October, 1836, and due 1st January, 1838, payable at the Commercial and Railroad Bank, at Vicksburg ; and the other made by Samuel G. Taylor, payable to Jesse Andrews, and by him indorsed, for \$2530·80 (credited by \$30, 12th October, 1836), due 1st day of January, 1838, payable at the Commercial and Railroad Bank of Vicksburg ; and the said Gold gave his note, with said James Bush his security, for the sum of \$1403·20, which three notes, amounting together to the sum of \$4904, was the full amount bid for, and the price, of said negroes ; and it was agreed, when said notes were paid, that the same was in full for said negroes, which appeared from the agreement filed as an exhibit with the answer ; by a memorandum, at the foot of which, it was agreed, that there was four months' interest on the two first notes, which, when collected, was to be credited on the last note. When this last note was executed, Bush, as the friend of said Perry, agreed to pay the same at maturity, and he accordingly paid \$300, leaving the balance, of \$103·20, to be paid by the interest due, when collected, on the other notes. One of the first two notes has been collected, but the other not, although judgment had been rendered upon it. Whether diligence had been used, he did not know. He believed the parties were solvent when the note was transferred to Hobbs.

Matilda Perry and Benjamin Strother, by their answer, adopt as their own the answer of their co-defendant Bush, as far as it goes. They insist that the statutory mortgage, or lien, is no longer subsisting, but has been discharged or raised. Because the first of the two notes, indorsed for two thousand dollars, had been paid ; and as to the other, in April, 1838, an action was commenced in the circuit court for Hinds county, against Taylor and Andrews, and on the 26th June, 1838, a judgment rendered for the amount, with principal and interest, of the note ; that after judgment was ren-

Steger v. Bush, et al.

dered, a stay of execution was given on the record of the judgment, by agreement between Hobbs, who was the plaintiff, and the defendant, for six months, without the consent of Bush or Gold, or the respondents ; that, at the time of the rendition of the judgment, and afterwards, the defendant Andrews had sufficient property, subject to execution, out of which the amount of the judgment could have been made. And the respondents aver, that the failure to make the money was produced by the stay of execution, and by the negligence of Hobbs ; and they are advised he is responsible for such failure, and thereby the lien, or mortgage, is raised or discharged ; that the respondent, Matilda Perry, is the widow and relict of said A. T. Perry, for whom the negroes were purchased, and has possession of them, except Caroline, who had departed this life.

The judgment, with the stay of execution on the second note, was obtained June 26th, 1839, and is in these words : " This day came a jury, &c., who, upon their oath, say, we the jury find for the plaintiff, and assess his damages at two thousand eight hundred and thirty dollars and sixteen cents, *with a stay of six months*. Therefore it is considered by the court that he plaintiff recover of the defendants, &c., *with a stay of execution six months*, and costs of suit, &c." On the 27th day of December, 1839, one day after the stay expired, execution issued ; and upon this, and other executions which issued from time to time, no money was made, because older executions took all the money produced by the levies and sales. The older executions and judgments amounted to about \$7000.

William J. Denson, a witness in behalf of the defendants, testified that Jesse Andrews, at the time of the rendition of the judgment against him in favor of Hobbs, had in his possession some thirty or forty negroes. Whether they were really his he does not know, he however believes they belonged to him ; on fourteen of which he obtained, in June, 1839, a deed of trust, and in February, 1840, another deed of trust on seven of the same negroes, and upon a tract of land in Scott county.

He believes that Hobbs's judgment was older than his deed of trust, because Andrews informed him that that was the reason that

Steger v. Bush, et al.

he run off his negroes, the judgment being for a security debt, and he being anxious to pay his own debts first. In an additional statement, the witness says, some time in August, 1840, he had occasion to examine into the indebtedness of Jesse Andrews, and found his liabilities to exceed \$40,000 ; some ten or twelve thousand dollars in judgments. In the spring of 1840, he obtained a deed of trust on the seven negroes, and the land in Scott ; and the fourteen, stated in his former deposition to have been conveyed, embraced those conveyed by the deed of trust. He never had any lien on any other than the fourteen negroes : at the same time with the above transactions, he obtained of Andrews, effects to the value of \$7000.

Howell Hobbs, the former administrator, testifies to the sale and purchase of the negroes, as set out in the answers, except that he understood that the sale was for the benefit of Gold himself : he proves the agreement filed with the answer of Gold, and that the first note has been paid ; but the other has not been paid, although he insists that he used due diligence, and that the bill of sale he gave was only to be positive when the two notes were fully paid : the title to be complete when the notes were paid.

Drury J. Brown testifies that he was present in court on the 26th June, 1839, being subpoenaed as a witness for plaintiff, and heard a conversation between Maj. Work, counsel for plaintiff, and Judge Mitchell, counsel for the defendants, in the case of *Hobbs v. Taylor & Andrews*, in which Mitchell proposed that he might take a judgment, provided he would give a stay of six months ; to which Work agreed, on the condition that the case be submitted to the jury, and let them give a verdict. Some four or five months after the rendition of the judgment, the witness was at the house of Andrews ; he then had some twenty-five negroes : some time after, he was again at his house, and found no negroes : he understood they had been run off. He believes that between the 26th June, 1839, and six months thereafter, the amount, and three times the amount, of the judgment of Hobbs, could have been made from the property of said Andrews.

O. D. Battle, witness for complainant, testifies that he believes,

Steger v. Bush, et al.

at the time of the rendition of the judgment of Hobbs, in June, 1839, against Taylor & Andrews, that Andrews was hopelessly insolvent ; not even able to pay his own debts, much less those on which he was security or indorser. Witness had to pay \$2000 or \$3000 for him, on execution, and is responsible for him, and on which he has been sued, for about \$17,000; and has used every means in his power to save himself, but without effect : believes that Andrews, when he run off his property, had liens and judgments on it, to an amount exceeding its value : has heard that Andrews run off some ten or fifteen negroes.

The following is the copy of the bill of sale, exhibited with the answer of the defendant, Bush :

“ Received of Joseph Gold, one note for two thousand dollars, made by Jesse Andrews, and indorsed by N. W. Hatch, and John A. Cotton, dated 12th October, 1836, and due 1st January, 1838, and payable in the Commercial and Railroad Bank, at Vicksburg; also one note made by Samuel G. Taylor, payable to Jesse Andrews, and by him indorsed, for twenty-five hundred and twenty $\frac{9}{10}$ dollars, and credited by thirty dollars, dated 12th day of October, 1836, and due 1st day of January, 1838, payable in the Commercial and Railroad Bank, at Vicksburg ; also his note, with security, for four hundred and three and $\frac{29}{100}$ dollars, it being the amount of the purchase-money for the following negroes : Ben, Jim, boy, and Caroline ; the above-described notes, when paid, will be in full for the above-named negroes. Given under my hand and seal, this 2d day of November, 1837. H. Hobbs, Administrator of H. Long, deceased.”

“ Four months' interest on the two first-named notes, amounting to four thousand five hundred dollars, to be credited on Joseph Gold's note, when they shall be collected. H. Hobbs.”

Work, for complainant.

The sale of the negroes took place about 2d November, 1837, and from that time the administrator had the statutory mortgage. See H. & H. 417, sec. 110.

The note on Taylor, indorsed by Andrews, fell due 1st January,

Stege v. Bush, et al.

1838, and suit was instituted thereon in the Hinds Court, 14th April, 1838, the first court after the note fell due.

There is no proof that the plaintiff, or his attorney, gave any indulgence. The jury, *in their verdict*, as the record filed by defendants will show, found for the plaintiff, with a stay of six months, and the judgment of the court was for the amount found, and the stay of six months. The stay, as appears, was the act of the jury, and the court. Judgment in favor of Hobbs was given 29th June, 1839, and the defendants file, in this case, an exhibit, showing that there were against Andrews five older judgments than that of Hobbs's, two of which amounted to \$4867·34, and there are also three other judgments against Andrews, and some of which, by the judgment of the Court, took the money in preference to Hobbs's, which raises the presumption, that the last three were older than that of Hobbs's.

The executions (two of them) were in the hands of the sheriff of Warren and Hinds, under which they sold nine negroes, cattle, &c., the property of Andrews, for \$4224·50, \$642·84 less than the amount of the aforesaid oldest judgment; and the sheriff returned that Andrews had no other property.

From this state of facts, which it is believed will be fully sustained by the papers before the Court, it is apparent that judgments given against Andrews, in 1838, long before the judgment of Hobbs could be, or was rendered, could not be satisfied, and that the judgment of Hobbs could not have been made *with or without* the stay of six months, and that said stay of execution (admitting it to be a stay) operated no injury to the defendants, and that, therefore, they cannot protect themselves by it. If this could be assimilated to a case of indulgence given to a principal by the creditor, by which a surety claimed to be released (which it cannot be; 3 Powell, 944; 2 Stark, 178, *Bedsford v. Deakin*), it would not release the surety, for the indulgence does not appear to be *founded on any consideration*. 4 Howard, 684, *Newell and Pierce v. Hamer, &c.*; 6 Cond. Rep. 636, *M'Lemore v. Powell*.

The prior lien of the mortgage made on the sale, 1st November, 1837, gave a right to a prior satisfaction, and the mere fact

Steger v. Bush, et al.

of not proceeding till a *subsequent lien* had attached, would not defeat that lien ; but here it does not appear that any subsequent lien did attach. *Rankin, &c. v. Scott*, 12 Wheaton, 177 ; 6 Cond. R. 506 ; *Andrews v. Wilkes*, 14S, late manuscript opinion of High Court, January term, 1842 ; 1 Peters, 443 ; Baldwin 246.

The stay, if it can be called a stay, was the finding of the jury, and judgment of the Court ; and if it is irregular, it is binding on all until reversed. 1 Bibb. 346, *Reed v. Hatcher*. Verbal testimony cannot contradict the record ; Hardin, 407 ; see H. & H. 620, making judgments a lien, not as strong as the mortgage lien. See Lit. Sel. Cases, *Hynes v. Rogers*, 229 ; 3 Powell on Mort. ed. 1828, side page, 949 (note E. 2).

The deposition of Drury Brown is loose and vague, and taken without cross-examination, and wholly unsatisfactory ; and, further, is incompetent to contradict the record, which shows the stay to be the act of the Court, and not of the administrator or attorney.

The bill of sale filed by the defendants given by Hobbs, the first administrator, expressly provided that the defendants were not to have a title to the negroes, till the notes *were paid*, and is precisely such a case as in Littell's Selected Cases, 229, aforesaid. The counsel of complainant strongly relies on the opinion of Marshall, in the case of *Rankin, &c. v. Scott*, before referred to. The particular attention of the Court is requested to the deposition of Owen D. Battle in this case, which shows that Andrews was insolvent from 1838, long before Hobbs's judgment (26 June 1839), till he went to Texas, in 1840.

Robert Hughes, for defendants.

We will urge several considerations upon the Court, why there should not be a decree for the complainant.

1. We insist that the facts and circumstances stated in the answer of Perry and Strother, and proven by the witnesses and the exhibits, show that Hobbs took the two notes referred to, engaged to collect them, and, when collected, the amount received should be in full of the price of the negroes ; and that one of said notes has been paid, and the other not paid or collected, by the laches of

Steger v. Bush, et al.

Hobbs or his counsel ; and, consequently, that it is the same thing as if it was paid. He is chargeable with it, and to that extent the statutory lien or mortgage is discharged.

Let us first apply the facts. The record, Exhibit No. 2., to the answer of Perry and Strother, shows that a stay was entered on the record by the Court, upon the rendition of a verdict, and after judgment. The entry of the stay, and the manner of it, is a curious legal proceeding, but for the testimony by which it is explained. The witness, Brown, was present, and heard a conversation between counsel, in which it was agreed that a judgment be rendered, provided a stay of six months was given ; and the case was submitted, on these terms, to the jury, and they rendered a verdict to that effect ; and the Court carry out the agreement, by entering a stay of execution accordingly. The same witness, Brown, and also W. J. Denson, show that, but for this stay, the money, by the use of due diligence, could have been made. Brown swears, that during the stay, he saw about twenty-five negroes in the possession of Andrews ; and he has no doubt that three times the amount of the judgment could have been made : and Denson shows that Andrews had some forty negroes ; and he, by the use of proper diligence, so late as the winter and spring of 1840, secured fourteen negroes, and other effects, to the amount of \$7000 ; true, he speaks of a lien which he had, but at the same time shows, most conclusively, that this lien, whatever it was, was younger in time than that of the Hobbs judgment ; yet Hobbs says he could not make the money by due and proper diligence. True, Mr. Hobbs, but if you had not given the stay, and thereby tied up your hands from proceeding until after Andrews run off his property, by the use of proper diligence you might have made the money, in full of the judgment : but in consequence of the stay of execution, all that could be run off, was so run off ; and then, when the execution issued, the older executions, to the amount of about \$7000 (and this is the full amount of all prior liens proven), took the whole of the property remaining ; and the younger judgment was left entirely unpaid. Now, whose act was this, and who is to suffer by it ? It was, most clearly, the act of Hobbs, the administrator, without the knowledge or consent of those now attempted to be affected by it; and the loss

Steger v. Bush, et al.

should fall on Hobbs, or the estate for which he was acting, and not on Gold, or his estate, or upon Perry, or those claiming under him.

Place the case on the strongest ground on which it can be placed for the estate of Long, that Hobbs, acting in the character of administrator, in order to the collection of a debt for the estate, undertook to collect this debt ; even then, the estate would be chargeable ; because he would be acting as agent for the estate, and for the other party. In this character, he should have prosecuted the action against Taylor and Andrews, to final judgment ; and, without stay, enforced execution. The principles which should have governed him, in this view of the case, are well laid down by the High Court of Errors and Appeals, in the case of *Fitch v. Scott*, 3 How. 314. That was a case against an attorney for negligence, in which, after the commencement of an action on a claim taken for collection, the attorney took from the defendant the assignment of a judgment, and dismissed the suit against him ; and the Court say : " The suit should have been prosecuted to final judgment, and then the process of obtaining satisfaction of it strictly followed up. By doing so, the ability of the debtors to pay the claim could have been tested by a legal and certain criterion." But this was not done ; and, for the reason set out in the opinion, the attorney was held liable, to the amount of the claim. And so in this case, Mr. Hobbs, acting for the estate of Long, and upon his engagement with Gold, should have made no compromise with Andrews, but should have pressed the claim to judgment ; and then, if, upon execution pressed in proper time, the money could not be made, Gold, or those claiming under him, would have been responsible. But, having taken upon himself to act otherwise, he must take the consequences ; which must be a loss to the estate of Long, and not to the other parties.

The right view, however, as counsel for the defendants believe, to take of this case, is, to place the engagement and liability of Gold and those claiming under him, and that of Hobbs, on the footing of creditor and debtor, and security.

The Exhibit No. 1, filed with the answer of Bush, shows that the notes were delivered to Hobbs, and, when collected by him, were to be in full payment for the negroes sold. This in itself, embraces an engagement, that Hobbs would use due and proper dili-

gence to collect, and not to look to the purchaser of the negroes, until a proper effort to collect those notes was made ; and an engagement on the part of Gold, or those under him, that after due diligence, and a failure to collect, they would pay. This, in all its features, is like the engagement of a security, or indorser, only to be enforced against the security, or indorser, in the event of non-payment by the principal, after the use of proper means of enforcement on the part of the creditor. The engagement is conditional : I will pay, if another does not. The proper means, therefore, must be used, to make that other pay, or the conditional promise does not become absolute.

In reference to such engagements or promises, it has been repeatedly decided by the courts, that any *binding* agreement, by which the terms of the agreement are charged, such as giving time, and the like, is a release of the surety or indorser. See *Newell and Pearce v. Hamer, et al.*, 4 How. 684.

The agreement by which the terms of the agreement are charged, must be a binding one ; because, if otherwise, no injury would be supposed to be done. To illustrate ; where judgment is rendered against principal and surety, and after judgment, the creditor or plaintiff, on application of the principal debtor, gives time on the execution, by directing the execution not to issue, or when execution has issued, directing it to be returned without making the money, or agrees for a specified time not to make the money ; but this is not founded upon any consideration, but is merely voluntary ; it is not binding, and the plaintiff is not bound to stand to it, but, notwithstanding his agreement or direction, may order an execution out, or have the money made. But where there is something given, some consideration deemed good in law passes, then the agreement is binding, and if violated can be enforced. In such a case the surety is discharged, because the law says he may pay the debt ; and, on payment, is entitled to be substituted to the rights of the creditor or plaintiff in the execution, and to make the money immediately on the execution for his own benefit. But where there is a subsisting agreement, which can be enforced, for a stay of execution, his situation is materially changed by the creditor. He

Steger v. Bush, et al.

cannot, by payment, be placed in a situation by which he can be reimbursed ; and the law, therefore, says he is discharged.

In these cases no inquiry is made, as to whether the money could or could not be made, but for the stay, or whether after stay it can be made. But upon the fact being ascertained, that the situation in which the surety has a right to be, has in fact been altered without his consent, he is discharged, and the creditor is left to resort to the principal, for the recovery of his debt.

Do not these principles apply to the case under consideration ? We think they do, most forcibly. A judgment was about being rendered, upon which, in the event of its payment, the title to certain negroes would vest and be absolute in the defendants. But in the event that the money on it could not be made, and the proper steps had been taken to enforce payment without effect, then the party claiming the negroes would not have them without paying the amount of the judgment. The money was not collected on the judgment, and that which the law required to enforce it was not done, but time given instead of an enforcement of the execution. Gold, or those claiming under him, had a right to pay the money to Hobbs, and take the judgment, and make the money upon it for their security at the time of its rendition ; but, instead of giving them an opportunity of doing so, an agreement binding upon Hobbs is made, for it was a part of the judgment of the Court, and founded upon what the party took as a good consideration, the permitting the judgment to go without contest, by which stay of execution is had for six months, and thereby the situation of the parties is changed, and the defendants are discharged.

But suppose we are wrong in the application of these principles to the case. Then we insist that there are other principles by which this case is to be governed, and which will settle the question. It is evident that the defendant, or the purchaser of the negroes in contest, could not be made chargeable in any manner, for the amount of the two notes delivered to and received for by Hobbs, but upon the statutory mortgage. There certainly was no liability on the paper delivered, because the name or names of none of the parties are upon it ; and in order to charge the property sold, and which is now in contest, he, the administrator, would have to come

Steger v. Bush, et al.

into this Court, upon the footing of the agreement which was made ; and that is what he, or his successor, has done, or rather attempted to do. How, then, does it stand ? He has or should have alleged that, as administrator of Harry Long, deceased, by order of the Probate Court, he sold the personal estate of said Long, and Joseph Gold became the purchaser of four of the negroes ; for which, however, he gave no note, but by an arrangement with (which was satisfactory to) the administrator, he transferred two notes, without indorsement, which he, the administrator, undertook to collect, and when collected, the same should be in full ; that he had collected one of the notes, but, after judgment and execution, he could not collect the other ; and, therefore, asks for an account, and that the property sold be subjected to the payment of the amount. If these facts, as stated, were admitted to be true, the Court would give the relief asked. But suppose, as is the fact, that the defendant says, true, the administrator has not got the money, but it is because he has not used the diligence required by law, but permitted six months after judgment to elapse without execution. What, then, would the Court say ? It is believed, that the reply of the Court would be, that an essential part of the title, to recover the money, or charge the property, is a statement of the reasons, or accounting for the fact, that the money was not made out of the note assigned ; and if, upon his own showing, or upon evidence, it becomes manifest, that the fact is to be accounted for by the negligence or failure to prosecute the claim in due time, then a title to recover is not made out. The principles which govern courts in other States, upon like cases, may, perhaps, afford us aid in our inquiry.

In Kentucky, choses in action are assignable, but not negotiable. There, an assignor of an assignable instrument is responsible on his indorsement, and will be chargeable to the amount of what he has received for the assignment, with interest, but only in the event that diligence is used to collect the amount of the note assigned, from the obligor or maker, and for the reason that the parties, by their agreement, look to payment from the instrument assigned, and one is intrusted by the other with the collection ; and before any other mode of payment can be insisted upon, than from the paper assigned, he who is the assignee, and who has been intrusted, must show that the

Steiger v. Bush, et al.

trust has been performed, and that with all diligence ; and in Kentucky, upon this question, these adjudications have been made. Assignee must use due diligence to recover the money of the obligor. An execution sent to a county where the obligor does not reside is not due diligence. *Hogan v. Vance*, 2 Bibb, 35.

The assignor is responsible, to refund the consideration received, if satisfaction cannot be obtained after due diligence by suit. 2 Bibb, 424 ; 3 J. J. Marsh. 268.

To omit to demand bail, when bail was demandable, in case the *ca. sa.* is returned *non est inventus*, is negligence. *Spratt v. McKinney*, 1 Monroe, 103, 104.

A contract is implied to refund the consideration received for the assignment, upon failure to collect from obligor, upon due diligence. *Thompson v. Caldwell*, 2 Bibb, 291.

The nature and extent of the engagement is not changed, by an agreement under seal, in the assignment, to pay in the event that the money is not made out of the obligor. By such agreement the action to be brought is only changed, and diligence, as in other cases, is to be shown. *Crann v. Hopson*, 4 Bibb, 286 ; S. C., 1 Marsh. 228.

Staying an execution, after property seized, is a discharge of assignor. *McGinnis v. Barton*, 3 Bibb, 6.

The assignee bound to sue at the first term. 2 J. J. Marsh. 218.

Suit must not only be commenced in time, but execution must also issue in due time ; and for neglect, in either, the remedy against the assignor is gone. *Smith v. Blount*, 2 Marsh. 522.

If the principles of these cases are applicable to the case under consideration, and that they are we cannot doubt, then the facts in the case show the complainants not entitled to the relief asked. For the remedy on the note in question has not been pursued with the diligence required by law, but the reverse is shown, and by it, as shown by the testimony in the cause, the debt has been lost, when, if a proper degree of diligence had been used, it would have been made.

Calhoun, for complainants, in reply.

It is contended by the defendant in this case, that the statutory

Steger v. Bush, et al.

lien upon the negroes, sold by the administrator to Gold, has been waived and forfeited by complainant, by the supposed stay, given on the judgment against Taylor and Andrews. It is believed this defence cannot avail them. It will appear by the record, that the stay of execution was given in the verdict and judgment; and the record nowhere shows that this was by the consent of the counsel of Long's administrators. See the last page of the record. The record cannot be explained, contradicted, or enlarged by parol testimony, as has been attempted by the deposition of Brown. If the judgment is irregular, that irregularity cannot operate a forfeiture of the plaintiff's lien on the slaves, for the purchase-money. It is competent for the debtor to contract with the creditor for time, and if the debt is due on simple contract, the defendant can plead a contract upon *valuable consideration* for delay; and for anything that appears to the Court, Taylor and Andrews may have had a right to this indulgence, by contract with the payees before assignment. Neither the attorney nor administrator could release the lien, by any collateral or direct act, except on payment of the money.

But the principles of law which govern this case, will be best seen by turning our attention to the contract between Hobbs, the administrator, and Gold, the purchaser of the negroes. It is the duty of administrators to sell the property of the intestate, upon a credit of six months, taking bond and security from the purchaser. See How. & Hutch. 411. The negroes, we must presume, were offered for sale on these terms, by Hobbs. Gold bid them off, and became thereby liable to the administrator for the amount in cash, and, on failure to comply with the terms of the sale, by giving bond and security, could have been at once sued for it. The administrator had no power, as such, to commute the security, which the law required by taking notes on other persons. The administrator, in taking the notes in this case, became trustee, in his individual capacity, of Gold, and, as such, is liable for negligence, if any has been committed, which is denied. An administrator has particular delegated powers, specially given by law, and when he acts beyond those powers, it is plain that such acts cannot be his acts as administrator. Thus, if he assigns a note given

Steger v. Bush, et al.

to his intestate, in payment of his own debt, the assignment is void. 4 Howard, 237. By the very terms of the receipt of the administrator and informal bill of sale, it appears that *the title should not vest in Gold, until the money was paid*. See bill of sale filed by defendants. The lien which the statute gives on slaves for the purchase-money cannot be divested, except upon due course of administration. He cannot sell or dispose of it for property or notes, but it can only be discharged by payment, for the benefit of the creditors and distributees. Gold is presumed to know that the administrator had no power, as such, to receive the notes in discharge of the bid, and he must abide the consequences of this irregularity.

But again ; Gold was liable on his bid for the money, and it lies not with him, or the other defendants, to complain that due diligence was not used to collect the notes, for he could, at any time, have paid the amount of the bid, and taken the control of them. An indorser is not released on refusal of the holder to sue on the bill, although he has notice to do so, and although the principal becomes insolvent. 5 Howard, 689. Nor is he discharged, if the execution against the principal is recalled, contrary to the request of the indorser, to have it levied. *Lenox v. Proul*, 4 Con. Rep. U. S. 311.

But if these views should not be correct, still, before the defendants can avail themselves of this defence, it must appear from the evidence, that the money could have been made on the judgment against Taylor and Andrews, if the stay had not been given. The proof does not show this. It appears from the evidence, that judgments against Andrews to a large amount, of prior date to this, yet remain unsatisfied, and that Taylor was insolvent. It is true, one of the witnesses says he saw some twenty-four negroes at the house of defendant Andrews, after the rendition of judgment, which he supposed were his ; but this is too vague. The witness Battle, states, that all his property, at the date of the judgment, was encumbered with liens, and that he was insolvent ; and Denson states, that his property was scattered, and hard to find, and that he was on the search. The record shows older judgments against him, to the amount of \$7416, with interest thereon, for a consid-

erable time before the rendition of the judgment of Hobbs against him, and the witness Battle speaks of others. Most of this amount remains yet unpaid, although due diligence, we must presume, was made to collect it. Besides, all the property which he had in his possession at the date of the judgment remained in his possession till after the six months' stay expired, and the execution had issued on the judgment of Hobbs ; and if he did not become insolvent pending the stay, but the debt was lost by his absconding with his property afterwards, certainly the complainants ought not to bear the loss occasioned by that act. So, upon every view of the subject, it is believed the complainants are entitled to relief.

The decisions in Kentucky, the Court is well aware, arise out of their peculiar statute of assignments ; the statute, or the decisions under it, have no analogy to mortgages, and it is believed those decisions can have no application to this case. It is believed the defendants' counsel has taken an erroneous view of some of the facts of the case, and has made improper inferences from the supposed facts ; if the execution had issued the day the judgment was given, it is manifest it could not have been made, because of numerous older judgments, which *did* take the money from Hobbs's judgment.

CHANCELLOR. The complainant, as the administrator *de bonis non*, upon the estate of Harry Long, deceased, seeks to foreclose the statutory mortgage, given in the case of administrator's sales, for a balance of the purchase-money, due for some negro slaves, belonging to his intestate, which were sold by the original administrator, and which are now in the hands of the defendant, Matilda Perry, whose husband seems to have been the real, although not the nominal, purchaser thereof. The case is defended on the ground, that, as to the unpaid portion of the purchase-money, the original administrator received the note of a third person, with indorsers, the proceeds of which were to have been applied in payment of this debt ; and that the administrator delayed the prosecution of that claim, until the parties thereto became insolvent. It is hence insisted, that the administrator became liable for the amount of the note so received ; and that, as a consequence there-

Steger v. Bush, et al.

of, the lien or statutory mortgage on the slaves is released and discharged.

Assuming for the present, that the facts, as thus stated, are true, it may be doubted, whether the legal consequences, which are supposed to follow them, are correctly laid down. By the statutes of this State, the power of an administrator, in selling the property of his intestate, is restricted to the mode there pointed out. It is declared, that he shall make such sales upon a credit of at least six months, taking from the purchaser "*bond, with approved security.*" How. & Hutch. 411, sec. 86. It is evident, that the bond of the purchaser himself, and not the transfer of the note of any third person, is what is contemplated by the laws. I think that there are the most solid reasons for questioning the power of an administrator, in such case, to substitute any other form of contract, or any other kind of security, than those prescribed by the law. The law contemplates an original and absolute liability on the part of the purchaser; and I incline to think that the administrator has no discretion to change its character into a mere secondary and contingent liability, by taking his indorsement of the note of a third person.

Such discretion would prove extremely hazardous to the safety of the estates of deceased persons. The stable security, which the law has wisely provided in such cases, would be often defeated by the accidents attendant upon the steps, necessary to fix the collateral liability of the purchaser, growing out of his indorsement. It would seem, upon principle, that where the law has prescribed one mode of doing a thing, it must be regarded as a limitation of power, and as an implied exclusion of every other mode of doing the same thing. An administrator is, in one sense, the agent of the law, which prescribes his duty and limits, and defines his power. His powers, in general, are no way analogous to those of an executor, who is the representative of his testator, and may do any act which the testator might have done, connected with the estate, unless inhibited by the will, or restricted by rules of law. If then it be true, that the original administrator, in this case, had no authority in law for receiving the note of a third person, in lieu of the direct liabilities of the purchaser at the sale, it is quite clear

Steger v. Bush, et al.

that no future neglect of his to enforce the collection of that note, could have the effect of discharging the mortgage which the law gives upon the property sold. I think that the administrator, in receiving the note, and undertaking its collection, must be regarded *quoad hoc*, as the mere agent of the purchaser, acting for his accommodation, and not as the representative of the estate. This, indeed, would seem to have been the true character of the understanding between the parties, as evidenced by the receipt taken on the occasion, which shows nothing more than a mere promise to apply the proceeds of the transferred note, when collected, in discharge of the money due for the purchase of the negroes. But, supposing the administrator to have been in the due exercise of his fiduciary duty and authority in taking the note, I am not prepared to admit, from the facts of the case, that such consequences follow the alleged delay, as those insisted on for the defendants. It appears, that the note was duly put in suit and prosecuted to a judgment against the maker and original indorser; but in taking that judgment, the administrator appears to have consented that it should be rendered with a stay of execution for six months; and this is the delay of which the defendants complain. Now I admit that a party, who receives from his debtor the paper of a third person, as collateral security for his own debt, is bound to use due diligence in collecting it, and that if it is lost by any delay of his, he becomes responsible for the amount, and will be considered as having made the debt his own.

But something more than mere delay is necessary in such cases; because mere delay, if no loss followed as a consequence thereof, could not be made the foundation of any complaint on the one hand, or of responsibility on the other. The counsel for the defendants seem to have been fully aware of the correctness of this position, and have introduced some verbal testimony, to show that the judgment might have been made available, but for the stay of execution which was given: this testimony goes no farther than to show that after the rendition of the judgment, one of the defendants thereto was in possession of a considerable amount of property. But the witness seems to have known nothing of its condition, whether it was or was not covered by numerous older liens and in-

Steger v. Bush, et al.

cumbrances. I am fully satisfied, from the whole proof in the case, that no amount of vigilance, in the prosecution of the judgment, could have made it available ; and that the failure to realize the amount thereof, must be ascribed to the existence of prior liens and incumbrances, which absorbed the whole property of the defendant in the judgment, and not to the delay which was given by the stay of execution. I arrive at this conclusion, as well from the testimony of Battle, who seems to have been familiar with the condition of Andrews, and who swears that he was totally insolvent in 1838, one year before the judgment was rendered, as from the record-evidence in the case, showing that there were numerous judgments for large amounts in the same court against him, of older date than the one on the note referred to, and which are still unsatisfied, after having been rigorously prosecuted.

Upon the whole, I shall direct a reference, to ascertain the amount due the estate of Long, and upon the coming in of the report, a decree may be had, enforcing the statutory lien upon the slaves mentioned in the bill ; costs to be paid from the proceeds thereof.

Cotton v. Parker.

DECEMBER TERM, 1843.

THOMAS COTTON v. JANE PARKER, ADM'X. OF JOEL PARKER
(DECEASED.)

It is a valid defence to an action upon a promissory note against the maker, that the note belonged to a deceased person's estate, and that the plaintiff received it in payment of an individual debt of the administrator.

Quare. Would the same rule apply, if the note were payable on its face, to the administrator of the deceased's estate?

A., having purchased property at an administrator's sale of the effects of B., cannot, when B.'s estate is insolvent, buy up the notes of B., to offset them against his debt to the administrator.

Where A. and B. have respectively mutual and subsisting demands against the other; and A. dies insolvent; B.'s debt against A. will be a valid off-set to A.'s debt against B., notwithstanding A.'s insolvency.

THE bill, in this case, was filed to enjoin a judgment at law, and was demurred to generally. The case was submitted to the Chancellor on a motion to dissolve the injunction. The opinion in the case gives all the facts.

Montgomery, and *Boyd*, for the motion.

The bill seeks to enjoin a judgment at law, and the fiat of the Judge follows the prayer of the bill. The exhibit filed by complainant shows only the original judgment: but the injunction is so phrased as to enjoin the judgment on the forthcoming bond. We file a full exhibit of the original judgment, and forthcoming bond, injunction, &c. The case appears to be in fraud of the Court. As no hint is made in the bill of the forthcoming bond, and no ground to enjoin the judgment on the bond, even if the attempt had been made, the injunction to that judgment must be dissolved. The case, we think, is exactly one requiring damages.

Oscar J. E. Stewart, for complainant.

An elaborate argument in this case is deemed by me unnecessary. As solicitor for complainant, I am content to call the attention of the Court to the allegations of the bill, which are admitted by the

Cotton v. Parker.

demurrer to be true. The allegations of the bill, in substance, are : that the judgment enjoined by complainant's bill was founded upon a note given by complainant to Joseph S. M. Lowry, administrator, &c., of John Furniss, deceased, for property of said Furniss sold by said administrator, as administrator aforesaid : that the estate of said Furniss has been reported insolvent, and that the said note was transferred by said administrator to Joel Parker, the intestate of the defendant, in payment of debts due by said Furniss, at the time of his death, and by said administrator, individually : that at the time Lowry paid his debt, and the debt of his intestate, to said Joel Parker, by the transfer of said note, the intestate of the defendant had notice of the complainant's being in possession of the off-sets in the bill mentioned, to the note so improperly and fraudulently transferred. Such a transfer was a breach of the bond of the administrator ; was a fraudulent appropriation of the assets of his intestate, of John Furniss, deceased, to the payment of his own debts. The laws will not execute a fraudulent conveyance of any kind, when discovered : and the *devastavit* committed by Lowry, by appropriating the assets of Furniss to the payment of his own debt to Joel Parker, would have been a good defence in bar to the action at law. See 4 How. p. 237, *Prosser, Appellant v. Leatherman*, and the argument and authorities referred to by Mr. Boyd, counsel in that case. The bill charges, that at the time of the rendition of the judgment at law, he was ignorant of the manner in which Joel Parker obtained possession of the note, and, consequently, could not plead the facts at law ; and his ignorance of those facts furnishes a ground for the interposition of a court of equity.

The consideration of the assignment was either wholly *good or bad, legal or illegal*. The note was a whole, a unit, an entirety; the assignee and assignor could not legally have a title to aliquot portions of the security. It may be true, that the complainant cannot, according to the doctrine settled by the Supreme Court in the case of *Cade v. Whitehead*, be allowed to avail himself of his off-sets in bar. But the question as to the fraudulent assignment by the administrator, which is admitted as true by the demurrer, and proven by exhibit, remains ; and as the intestate of defendant under

Cotton v. Parker.

the fraudulent assignment never had cause of action, his administrator has none. An allegation of fraud must be answered. 5 How. 364, *Niles v. Anderson*. Facts amounting to fraud must be answered. 4 How. 436, *Parham, et al. v. Randolph, et al.* The facts charged amount to fraud, according to the doctrine in the case of *Prosser v. Leatherman*, administrator, before recited, and should be answered.

CHANCELLOR. The complainant purchased from the estate of John Furniss, deceased, at the administrator's sale, property to the amount of seventeen hundred and fifty dollars, for which he gave his promissory note. This note was afterwards put in suit, and a judgment obtained thereon, in the name of Jane Parker, administratrix of Joel Parker, deceased. This bill is filed to enjoin that judgment, upon the following grounds :

First. That the administrator of Furniss, to whom the note was payable, wrongfully transferred it to Parker for the purpose of paying a debt due in part from the estate to Parker, and in part for the purpose of paying a debt due from the administrator, individually, to said Parker.

Second. That the complainant had, before the commencement of the suit against him, *possessed* himself of the promissory notes made by Furniss in his lifetime, to a greater amount than his note given to Furniss's administrator ; that these notes were placed in the hands of an attorney for the purpose of being set off against the one upon which the judgment was obtained ; but that the attorney, through mistake, failed to plead said notes as a set-off, but put them in suit against the indorser thereof, and obtained judgment thereon.

Third. That the estate of Furniss is insolvent, and that the transfer of complainant's note to Parker by the administrator, in satisfaction of Parker's claim on the estate, gave him an unjust preference.

1. It was held by the Supreme Court, in the case of *Prosser v. Leatherman* (4 How. Rep. 237), that it is a good defence at law to an action on a promissory note, that the note belonged to the estate of a deceased person, and that the plaintiff received it of the administrator in payment of an individual debt due by the latter.

Cotton v. Parker.

In that case, the note was payable and due to the intestate in his lifetime; here, the note was payable to the administrator himself. It is unnecessary for me to decide whether this difference in the character of the two notes would vary the application of the principle laid down by the Supreme Court, or not. It is sufficient that it was held to be a legal defence, and that the complainant neither made that defence, nor instituted or directed it to be made, nor shows any cause for his failure to do so. The defence, which he says in his bill he instructed his counsel to make, was that of a set-off. It is unnecessary to decide whether the mere misapprehension of his counsel constitutes a sufficient excuse for his neglect to make that defence at law, or not ; because he states himself out of court, by showing that the estate of Furniss has been declared insolvent by the court having jurisdiction of the administration thereof. The complainant, having become indebted to the estate by purchase from the administrator, cannot, either at law or in equity, set off any indebtedness of the intestate, arising in his lifetime, against that demand, after the estate has been declared insolvent. He must submit to share his *pro rata* dividend with the other creditors. If the rule were otherwise, the policy of the law relating to the distribution of insolvent estates might be totally defeated. One creditor would only have to watch the sale of the estate, and purchase to the amount of his claim, and then set off one debt against the other, and leave the other creditors to share a meagre and fractional dividend. Such an expedient would be a fraud on the law, and can find no sanction in the courts charged with its administration. If the demands were mutual and subsisting during the lifetime of the intestate, the rule would be different, notwithstanding the insolvency of the estate. In that case, one debt would be considered as extinguishing the other during the lifetime of the intestate, and the debt due him could not, of course, be regarded as assets in the hands of his administrator. The motion to dissolve the injunction must be sustained.

DECEMBER TERM, 1843.

OSCAR HOPE v. S. W. EVANS, et al.

Where the bill charged upon the defendant the introduction of negroes into this State for sale, which was positively denied by the answer, and proof in corroboration of the answer taken ; held, that proof of mere admissions of the party defendant, that he had so introduced the negroes, would not alone be sufficient to overthrow the positive denial of the answer, and the corroborative proof.

Proof of mere admissions of a party, unsustained by any other circumstances, should always be cautiously weighed ; because of their liability to be misunderstood, the facility of fabricating them, and the difficulty of disproving them.

Where a party has knowingly entered into an illegal contract, and has voluntarily made payments therein, he has no claim either in law or equity to recover back the money so paid.

E. sold H. a tract of land and negroes, some of the latter of which had been brought into this State, in violation of law, for sale ; H. made partial payments and filed his bill to rescind the contract of sale, which he averred was an entire one, on account of illegality ; held, that H. was entitled to no relief ; that the Court could not decree a repayment of the money already paid, and could not decree a *partial* rescission of the contract.

OSCAR HOPE, the complainant, filed his bill, alleging, that, in the year 1836, he purchased of Evans a large quantity of lands and a number of slaves by one entire and undivided contract, for which he agreed to pay said Evans the sum of thirty-six thousand dollars ; that, to secure the payment of notes given by him for this sum, he conveyed the same real and personal estate to the defendants, Pope and Hamer, in trust, to sell the same, on certain terms, in case of his default, and apply the proceeds to the payment of his debt ; that the whole of the debt has been paid, except the amount due on two notes, for the sum of forty-five hundred dollars each, due on the 1st of January, and on the 1st of April, 1841 ; that the trustees had advertised the land and slaves for sale, under the trust deed ; and complainant prays that they be restrained from so doing by injunction. Complainant alleges that five of said negroes, purchased by him of said Evans, named Abner, Patsy, Terry, and Silsy, and her child Jane, forming part of the consideration for which he was to pay said sum of thirty-six thousand dollars, were introduced into this State by said Evans in the year 1836, from the State of Tennessee, as merchandise, in violation of the constitution of this State.

Hope v. Evans, et al.

The complainant insists that these facts render invalid the whole of said contract, and prays its rescission, on condition of his restoring the property to Evans, and accounting for rent and hire, and claims to have refunded to him the amount of his payments, with interest on them.

The answer of the defendant, Evans, admits the sale to the complainant, and the payments ; he denies, however, the introduction of the negroes for sale. He states that he had been a citizen of the State ever since A. D. 1831, and during all the period a slaveholder and cotton-planter. He admits the introduction of the five slaves, but states that they were for his *individual use* ; that he put them on the plantation and worked them with his other negroes, until he sold the whole to the complainant.

Edward D. Edwards testified that he sold to Evans, the plantation and negroes afterwards sold to Hope ; that Evans, after the purchase, brought negroes from Tennessee and put them on the place ; that Evans bought of him in the spring, but was not to get possession until October ; that when he took possession in October, the witness took his own negroes off, and Evans supplied their place with those brought from Tennessee ; that they were brought, so far as he knew, for Evans's own use, and not for sale ; that after Evans had taken possession of the place, he wanted to get off the contract, because he had not hands enough to work it properly, and that the witness sold him six more of his negroes, which were essential to give Evans a proper force ; that in the October in which he took possession of the place, Evans told the witness, he had seen a place on the Tallahatchie river, which he wished to buy, or had already bought, which suited him a great deal better than the place he had bought of witness, and that he, therefore, wished witness to let him off of the trade ; which, however, the witness refused to do, and Evans soon after sold to Hope. The witness testified further, that he had known Evans from his infancy ; that he was a man of education, had inherited a large fortune, and had never been, or been regarded by any as a negro-trader ; that immediately after the sale to Hope, Evans moved to the place on the Tallahatchie, and had lived there ever since.

Alvarez Bridges testified that Evans, before he sold to Hope,

Hope v. Evans, et al.

offered to sell to him the land and negroes, which he afterwards sold to Hope.

James W. Cusack testified, that, in the spring of the year 1836, Evans informed him that he had purchased of one Edwards a plantation in Yazoo county, which was the same subsequently sold by Evans to Hope; that he purchased part, but not all, of Edwards's negroes, and that he would visit the State of Tennessee, during the then ensuing summer, and would then purchase as many negroes as would supply the deficiency, bring them to this State, put them on the plantation he had bought of Edwards, when he thought he would be able to sell both land and negroes at an advance upon their cost; that Evans stated, that he expected, when he purchased of Edwards, to make a speculation out of the purchase, by supplying the deficiency of hands, and selling at an advance. Upon cross-examination, he stated, that the five negroes, when brought by Mr. Evans from Tennessee, were put upon the plantation with his other negroes, worked with them, treated like them, and, finally, sold with them; and that Evans had been a citizen of this State, and property-holder, ever since the year 1831.

Samuel H. Galloway testified, that in the "forepart" of October, 1836, Evans had offered to sell him the land and negroes, which afterwards he sold to Hope; that about six of the negroes on the place were brought into Mississippi by Evans, for sale, as he learned from Evans; that they were to be put on the land sold to Hope, for the purpose of selling with the land.

Upon cross-examination, he stated, that the negroes were introduced into the State by Evans, to supply the deficiency in force upon the plantation purchased by Evans of Edwards, occasioned by the withdrawal of Edwards's hands; that the introduction of the negroes was for Evans's own use, and for the purpose of enhancing the value of the land, should he sell them together.

Upon this state of pleading and proof, a motion was made to dissolve the injunction obtained by Hope.

Wilkinson, and Miles, in behalf of the motion.

The depositions of all the witnesses prove, that Evans had, for a number of years before he sold the property to Hope, become a

Hope v. Evans, et al.

citizen of the State, and during the whole time, the owner of considerable landed and negro property. And they all corroborate the answer of Evans, in every essential particular ; except that of Galloway, and his answer to the third cross-interrogatory of complainant, completely explains away his answers to the examinations in chief. The deposition of Edwards, from whom Evans purchased the property, places the transaction in its true light ; and shows conclusively, that defendant, Evans, is not one of those men whose property has been accumulated by an illegitimate traffic in human flesh and blood.

A motion is now made to dissolve the injunction on bill, answer, and proof.

In support of the motion, we contend that this case does not fall within the rule of law established by the Supreme Court, in its three several decisions reported in 5 How. Rep. In those cases the contracts were made for the purchase of slaves, confessedly introduced into this State for sale and merchandise, in violation (as it is said) of our constitution ; the introducers being non-residents, and professed negro-traders. Here, the vendor is an "*actual settler*," and introduced the negroes for his "*own use*," as he was permitted to do by the proviso contained in the negro-clause of our constitution. The answer denying the bill, will be taken for true, unless contradicted by two witnesses ; or by one witness, and corroborating circumstances. There is but *one* witness who contradicts the answer ; and he does not do so *positively* ; whilst all the *circumstances* of the transaction, as developed by the pleadings and proof, weigh strongly against the witness, and in favor of the answer.

Besides, it is insisted, that if the contract is void, it is only so to the extent of the five negroes introduced by Evans. Although the purchase is alleged and admitted to have been an entire one, we are yet to learn, that a failure of title to a *portion of personal property*, will, as in case of lands, where that portion furnished the main inducement in making the contract, authorize this Court to rescind the entire contract.

Further, it is contended, that even although the original contract between Evans and Hope were utterly void ; yet, Hope's subse-

Hope v. Evans, et al.

quently conveying this property to Hamer and Pope, in trust for the payment of the debt due Evans, removes the illegal taint from it; and raises a new promise and undertaking on the part of Hamer and Pope, based upon a new and distinct consideration.

It has been held in England, 1 Bos. and Pull. 3, id. 295, that if A. is indebted to B. on an *illegal* consideration, and places money in the hands of C., to pay the debt, that B. may maintain an action against C. for the money. This doctrine has been expressly recognized by the Supreme Court of the United States. 11 Wheat. Rep. 258; 6 Cond. U. S. Rep. 298.

Now, it is contended, that the case at bar falls directly within the principles decided by the cases quoted. Admit that the contract between Hope and Evans, was *void*, for the sake of argument; yet, Hope placed in the hands of Hamer and Pope the property embraced in the trust deed, for the purpose of paying the debt due to Evans. They are bound by their acceptance of the trust to comply with its provisions, and sell the property, whenever Hope makes default in making the payments stipulated for.

R. S. Holt, for complainant.

The issue of fact raised is simple in the extreme, and the testimony adduced in illustration of it, equally free from complexity. It proves, conclusively, an intention on the part of Evans, as early as the spring of 1836, both before and after his purchase from Edwards, to bring to this State from abroad, as many negroes, as would, with those which he proposed to purchase, and which he did purchase from Edwards, make the complement of the plantation, and then to expose them to sale together, or in connection with the plantation.

The testimony of Galloway is equally clear as to these facts. He says, that he was informed by Evans, that six or eight of the negroes sold by him to Hope, "were brought into this State for sale," that they were to be put on the land sold to Hope, "for the purpose of selling with said land." That Evans supplied the deficiency of hands on the plantation, with the view of selling at a profit.

The circumstances proven are fully confirmatory of this direct

testimony. It is shown that Evans, under his contract, was not to take possession of the plantation until the 1st of October ; that he returned to this State, with the negroes which he introduced, about this time ; and that, ten days after he got possession, he was offering the whole property for sale. If the purchase was made by Evans for his own use; why so eager to sell as soon as he acquired title ? Does not his conduct prove that he still cherished the purpose with which he informed Mr. Cusack and Mr. Galloway that he had made the purchase from Edwards, and with which he determined to bring negroes from abroad ?

It is thus placed beyond all question, that Evans, in the spring of 1836, determined to bring from Tennessee to this State, negroes for sale, and that about the first of October, 1836, he did return to this State and bring the negroes, described in the bill and answer as brought from abroad, with him ; and, in pursuance of his original purpose, did sell them to Hope in connection with other property.

It is no doubt true, that Evans kept the negroes on the plantation, engaged in his service, from the time of his entering on the possession until he sold to Hope ; but it is impossible that this circumstance, whether accidental, or designed to evade the penalties denounced against an unlawful traffic, can relieve his contract from the imputation of illegality.

It was, and still is, true, that Evans introduced these negroes into this State from abroad, and with the intent to sell them, notwithstanding he may have engaged them in his own service, for a short time, before he was enabled to accomplish his purpose of selling.

The presumption arising, from Evans having engaged the negroes during this time in his service, that he brought them to this State for his own use, is completely overthrown by the positive proof that he brought them here, for sale, as merchandise.

The allegation of complainant, then, that five of the negroes, which constituted part of the subject of this entire contract, described in the bill, were introduced into this State as merchandise, by said Evans, in the year 1836, is fully sustained by the proof.

Such being the character of the contract between Hope and Evans, it is utterly void by the repeated decisions of the Supreme Court of this State. 5 Howard, 80, 110, 769. The second of

Hope v. Evans, et al.

these decisions was on a contract identical in all its features with the one now under consideration.

George S. Yerger, on the same side.

This bill is filed to rescind a contract of sale for land and slaves. The contract was an entire one, and the entire price an aggregate one. Part of the slaves were introduced into the State, in 1836, for sale and merchandise.

The answer denies he brought the slaves for sale, and states he brought them for his own use.

But the proof is clear, that he brought them in for sale, and speculation, under a pretended shift or cover. The facts are, he purchased a tract of land (the same sold to complainant), in April, 1836, from Edwards (together with some slaves, but not all that Edwards worked). He purchased the place and negroes, with a view to speculate upon its immediate sale, but there not being hands enough to supply the place, he determined to go to Tennessee, to purchase additional hands, and put them on the place, and then sell all together. He accordingly did go, and immediately on his return, with the slaves, sold to complainant, to wit, in Nov. 1836. His intention to sell all (including those he intended to bring into the State) is proved by Cusack. The same witness also proves his object, in buying the place and the hands, was to supply the deficiency of hands, and then sell, at an advance.

He took possession, Oct. 1836, and sold in Nov. 1836.

But Galloway proves clearly his object. He says Evans told him, he brought the negroes from Tennessee for the purpose of selling them, by putting them on the plantation, and selling all together; and that his object in buying them, was to sell the whole at a profit.

1. The Constitution prohibits the introduction of slaves for sale, whether introduced by a foreigner, or a citizen, unless the latter introduces them for his own use, i. e., to plant with, and use in planting. If he introduce them to sell, either by themselves or as an adjunct or aid to sell others; or to make a speculation by selling them, with a plantation and other slaves, which he bought to

Hope *v.* Evans, et al.

sell again, he is within the words, as well as the spirit, of the constitution. (5 How. 769.)

To permit a contrivance, or artifice, of this kind to prevail will point out the way by which the constitutional provisions can be evaded, and the policy of the State be overturned.

If the object was, to bring them into the *State to sell*, it matters not whether it was to sell together with others, or to put on a place, and sell all together, or sell separately ; it is not the mere act of introducing, but the *quo animo*, the intention with which they were introduced, that constitutes the prohibited act. If it was to *sell*, or speculate, it matters not how it is cloaked, or covered, it is void. It would be strange, if the policy of the State could be evaded by so shallow a subterfuge.

The contract in this case being entire, and not yet completely executed, and being against the direct prohibition of the fundamental law, is, according to most of the authorities, void *in toto*.

Sometimes a contract is illegal as to part, and good as to part ; particularly, when it is illegal by some common-law principle, is good as to the part which is legal, and bad for the residue. But when a deed is made, or a contract which is entire, and embraced in the same deed, or writing, is void by statute, it is void *in toto*. *Hyslop v. Clarke*, 14 John. Rep. 465 ; *Farrer's case*, 3 Rep. 78 ; *Plowden*, 54 ; *Cromwell and Horton v. Crutcher*, 4 Yerger, 541.

The modern cases, or some of them, say, if a contract is illegal for part, and legal for the residue, if the good can be separated from the bad, the court will do it ; but if it is *entire*, and incapable of separation, the whole is bad. *Vide Chit. on Cont.* 536, 537 ; *10 Pet. Rep.* 358, 360 ; *8 Pick.* 512.

In this case, it is impossible to separate the contract, unless it be to separate the land, which was sold for \$18,000, from all the slaves, which were sold for \$17,000. The latter cannot be apportioned, because of no separate value in each slave ; it was a lumping sale of all, and cannot be apportioned ; and, according to the above authorities, it is void for the slaves. If it is, a perpetual injunction must be granted.

Hope v. Evans, et al.

CHANCELLOR. This case was submitted, on motion to dissolve the injunction therein, on bill, answer, and depositions.

In 1836, the complainant purchased of the defendant, Evans, a plantation and negroes, in the county of Yazoo, at the gross sum of \$36,000, payable in instalments, at different periods thereafter ; and then conveyed the same property, in trust, to secure the payment of the several instalments as they fell due. In the spring of 1842, there being then a balance of nine thousand dollars due, on the purchase, the trustees advertised that they would sell the property under the deed of trust, to raise that sum. This bill was filed to enjoin that sale, and rescind the original contract, and to recover back the money paid thereon ; mainly on the ground, that a part of the slaves, which entered into the consideration of the contract, were introduced into this State, by the complainant, for sale, in violation of the law. This allegation of the bill is positively denied by the defendant, who states, that he was, at the time of the sale, and has since been, a citizen and cotton planter in this State, and that the slaves, referred to by the complainant, were purchased and brought to the State, and placed on his plantation, for his individual use. The deposition of Edwards, from whom Evans purchased the land, sold to the complainant, proves, that the additional slaves, brought into the State by Evans, were necessary for the cultivation of the land ; that the negroes, when brought here, were immediately placed upon it, and that Evans had been a citizen of this State for five years, at the time of the sale, and had never been known to engage in the business of buying and selling slaves. That when Evans returned with the slaves, from Tennessee, he told the witness, that he had bought, or rather wished to buy, a place in Tallahatchie county, and wanted Edwards to release him from the purchase made of him. This deposition shows, in the first place, that the purchase of the slaves by Evans, in Tennessee, was rendered necessary for the cultivation of the plantation bought of Edwards, and sold to the complainant, and, to that extent, shows that they were not purchased for sale. In the next place, it accounts for the sale that was immediately afterwards made to the complainant, by showing that Evans had found another place, which he preferred to the one sold. The facts, thus detail-

ed, are strongly in support of the answer, and the question is, Whether the positive statements of the answer, thus corroborated, are countervailed by the other proof in the case. The substance of the testimony of the other two witnesses, is, that Evans told them, after he purchased the plantation from Edwards, that he would bring some negroes from Tennessee, and supply the deficiency on the place; and that he thought he would be able, in that way, to sell the plantation and negroes, for an advance upon what he gave for it; and that, shortly after bringing the slaves to the State, he sold to the complainant. This is the whole of the testimony upon which it is attempted to deduce the inference (for it leads to nothing more), that a part of the slaves sold the complainant, in connection with the plantation, were brought here as an article of merchandise, and for sale. Is this testimony, leading to mere inferences, explained and weakened as it is by the testimony of Edwards, and opposed by the positive denial of the answer, to be taken as sufficient to fix upon a citizen, indirectly, the charge of violating one of the penal laws of the country? I think not. Proof of mere admissions of a party, unsustained by any other circumstances, should always be cautiously weighed, because of their liability to be misunderstood, the facility of fabricating them, and the difficulty of disproving them. Where it is sought to set aside a contract, on account of the alleged illegality of the consideration, the proof should be full, clear, and direct to the point, and not rest upon remote inference or doubtful deduction. But even if the allegation of the bill, in this particular, were fully and clearly proved, I should still not be satisfied, that the complainant is entitled to the relief which he asks. It is quite clear, upon both principle and precedent, that I cannot decree a repayment of the money, which the complainant says he has already paid, if the contract, as is alleged, be illegal.

The complainant, by his own showing, knowingly entered into an illegal contract, and afterwards made large and voluntary payments thereon. He is, then, a *particeps criminis*, and, as such, has no claim to recover back the money, either at law or in equity; the maxim, *volenti non fit injuria*, applies equally in both courts. (*Merwin v. Huntington*, 2 Conn. Rep. 209; 1 Salk. R. 23;

Hope v. Evans, et al.

Douglass, Rep. 673; *Sprague v. Birdsall*, 2 Cow. Rep. 419; *Clark v. Dutcher*, 9 Cow. Rep. 674; *Greenwood v. Curtis*, 6 Mass. R. 381.) This latter case is worthy of some notice, because it is not very unlike the case before me, in some of its features. The plaintiff, in that case, brought a suit in Massachusetts upon a contract for the delivery of slaves. The Court held, that no recovery could be had, in that State, upon such a contract, being void by their laws. (*Greenwood v. Curtis*, 4 Mass. Rep. 93.) The plaintiff afterwards brought an action of assumpsit to recover back the money which he had paid and advanced upon the faith of that contract; when the same court held, that it was money voluntarily paid, on an illegal contract, and could not, therefore, be recovered back. It is a general rule, that where a party knowingly and voluntarily pays money, which at law could not have been recovered, he can have no remedy to recover it back. (*Morris v. Tarin*, 1 Dallas, 148; *Bogert v. Nevins*, 6 Serg. and Raw. 369; 2 Conn. 209.) As, then, I cannot decree the money to be paid back, which has been already voluntarily paid, it would seem to follow that I should not disturb that portion of the contract which remains unexecuted; as it is a well settled principle, that a court of equity will never decree a partial rescission of a contract; and especially where, as in this case, the complainant insists that the contract is entire, and incapable of apportionment, and that the illegality, upon which the rescission is asked, goes to the whole consideration of the contract.

In the case of *Fitzroy v. Gwillim* (1 Term. Rep. 154), it was held, that where a party applies for a rescission of a contract on the ground of its illegality, the rescission must be total, for he should not be allowed to take any advantage under it. So in the case of *Johnson's heirs v. Mitchell's heirs* (1 Marsh. Rep. 227), the Supreme Court of Kentucky held, that an entire contract cannot be affirmed so far as it has been performed, and rescinded for the residue. In the case before me, the complainant has done acts, in the performance of the contract, which the Court, according to established precedents, cannot undo; and as I cannot, according to the authorities referred to, make a partial rescission, the complainant would

206 SUPERIOR COURT OF CHANCERY.

Hope v. Evans, et al.

seem, by his own conduct, to have precluded himself from any relief in this Court. I am of opinion, therefore, whether I look to the facts, or the law, of the case, that the injunction should be dissolved.

DECEMBER TERM, 1843.

THOMAS E. ROBINS, et al. v. BOWLING EMBRY, et al.

A corporate body can make an assignment of its property, in trust, for the payment of its just debts, preserving to each creditor the right of sharing, *equally*, according to the amount of his claim.

The property of a banking corporation is a *trust fund* for all its creditors ; and in an assignment by such a corporation, if a preference in favor of the debts due to any particular creditor, or set of creditors, is given, the assignment will be void. *Sed quære.*

Banking corporations are trustees, not only for the stockholders, but also for the creditors, who have a *prior and paramount equity*.

The creditors of a corporate body can enforce their claims against any of the property of the incorporation, in the hands of persons affected with a knowledge of its corporate character.

It is essential to the validity of an assignment, by an incorporation, that the assignor, by the assignment, part absolutely with all title to the property, and all authority to control it, free from all restrictions that will unnecessarily delay creditors ; there must be no reservation, for the assignor's benefit, except of the surplus ; no authority given to control or direct the assignees ; and all the uses must be expressly declared ; where any of these objections exist, the assignment will be void.

A banking company, to which a railroad was by its charter affixed, having nearly completed the road, and exhausted its means, being compelled to make an assignment for the benefit of its creditors, and the period for completing the road allowed by the charter of the company having nearly expired, the expiration of which, without the completion of the road, would cause a forfeiture of the charter, and the road, in its then condition, being comparatively worthless, and its not being completed would be a total loss to the company of the amount expended, and would, if not destroy, greatly diminish, the ability of the company to meet its debts ; *held*, that a provision in the deed of assignment authorizing the assignees to borrow two hundred and fifty thousand dollars to complete the road, and pledging the assets of the company, and the profits of the road, for the payment of that sum when borrowed, before any of the other debts were paid, did not vitiate the assignment.

If an assignment be otherwise free from the imputation of fraud, it is not vitiated by being made in part to secure anticipated advances, especially where those advances are in aid of the general purposes of the assignment.

A banking corporation with a railroad annexed, in making an assignment of its effects to assignees, to pay its debts, assigned to the assignees the power of managing and controlling the railroad ; *held*, that this provision of the assignment merely assigned the profits of the road, with the temporary control of the road, to the assignees, for the benefit of the creditors, and did not vitiate the assignment.

In such case, if the charter had required a committee of the directory to manage the road, an assignment by the directory, of the management of the road, to others than a committee of the directory, would be a matter between the directors and stockholders, or the latter and the government, and could not be questioned by another person.

A provision, in a deed of assignment, by a corporation, that the directory should have power to appoint new trustees to fill any vacancy that may occur by death or otherwise, is not a reservation that will vitiate the assignment.

Robins, et al. v. Embry, et al.

Where, by an assignment for the benefit of creditors, twelve months were allowed to collect the debts, and convert into money the property of the assignor, before distribution among the creditors, the debts being numerous, and widely scattered over the country, and the creditors of the assignor residing at distant places; *held*, that the time allowed was not unreasonable, and would not render the assignment void.

Where an assignment is made by a bank, of its effects, to pay its debts, at a period of great pecuniary embarrassment, and general insolvency, and power is given by the assignment to the assignees to compromise with the debtors of the bank, in such manner as would be, in the judgment of the assignees, "*to the interest of the creditors of said bank*"; *held*, that the assignment was not vitiated by such a provision, and the power might be exercised.

Where a bank, with a railroad attached, in an assignment of its effects, made the assignees the joint agents of the bank and its creditors; in the management of the road, the agents of the bank; and in the receipt and disbursements of its profits, the agents of the creditors; *held*, that the provision in the assignment gave the bank no control over the assignees, and did not avoid the assignment.

A railroad, built by an incorporated company, for public travel and transportation, is a mere *franchise*, and not assignable by the company.

In an assignment, by a bank, of its effects, a provision, prohibiting the assignees from paying any claims, until their validity has been tested in a mode pointed out in the assignment, *held*, not to avoid the assignment.

Where, in a deed of assignment of its property, a bank conveyed, in general words, *all its effects*, *held*, that the omission to annex a schedule of the property assigned is no objection to the validity of the assignment.

In a deed of assignment by a bank, a covenant, on the part of the assignees, to exhibit, periodically, a statement of their accounts to the board of directors, is no objection to the validity of the assignment.

Where a deed of assignment, by an incorporation, of its effects, for the payment of its debts, is void in part, it is void *in toto*.

A provision in a deed of assignment, by a bank, requiring the assignees "*to pay all the necessary expenses of the president, directors, and company of the bank, in the management of the corporation*," *held*, not to be such a reservation, for the benefit of the grantor, as will make the assignment void *upon its face*; the fund assigned for the payment of the debts being not only of a limited and definite amount, but also of an indefinite assignment of annually-accruing profits; and the reservation not appearing to be for any fraudulent purpose.

THOMAS E. ROBINS, William S. Bodley, and William C. Walker, filed their bill, in which they state, that on the 13th day of February, A. D. 1840, the President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, a duly incorporated company, assigned, by two deeds of assignment, all its property, and all the proceeds and profits of the railroad, to assignees, for the benefit of the creditors of the company. These deeds were exhibited with the bill. That Thomas E. Robins, William S. Bodley, and William W. Frazier, were the assignees of the bank, who accepted, and entered upon the discharge of the trusts

Robins, et al. v. Embry, et al.

contained in the assignments ; that they had provided funds to, and did complete the railroad unfinished at the time of the assignment, and proceeded to the collection of the debts ; that in June, 1841, W. W. Frazier resigned his office as trustee, and William C. Walker was appointed, in the mode prescribed by the deeds, in his stead ; that since the execution of the deeds of assignment and the transfer of the effects of the bank to the assignees, various creditors of the bank had obtained judgments to different amounts against the company, and had levied executions upon real estate, belonging to the company before the assignment, and conveyed to the assignees, upon which the depot buildings attached to the railroad, in the city of Vicksburg, were erected ; the bill prayed for an injunction, which was granted.

An amended bill was afterwards filed, stating, that the assignees, immediately upon the execution of the deeds of assignment, had taken possession and full control of all the property assigned ; that at the time of the assignment, the railroad was finished only thirty miles in length, and did not extend to Jackson, its eastern terminus, by fourteen miles ; that the part of the road then completed cost about eighteen hundred thousand dollars, all of which would have been hazarded, and probably lost : the public, and the creditors of the bank, would have been greatly injured, if the road had not been finished by the time stipulated in the charter.

" That the money stipulated to be borrowed to finish and complete the road, had been borrowed, and was advanced on the faith of the stipulation contained in the assignment ; that the intention of the bank, in making said provision to borrow the money to complete the road, was honest and *bona fide* ; that at the time of the assignment, the bank was embarrassed in her condition, a large amount of debts was due to her, but it was almost impossible to realize them, or a greater part of them, for a long time thereafter ; that the bank was without means to complete the road, and could not have done so within the time stipulated in the charter, without borrowing money as stipulated in the assignment ; the time within which said road was to be completed had nearly expired, not more than about twelve months being left within which to complete it ;

Robins, et al. v. Embry, et al.

that, in pursuance of the power given them, they borrowed the money to complete the road, and that it has since been completed, and is now in successful operation."

To this bill, and amended bill, there was a general demurral, filed by A. H. Arthur, one of the defendants. The deeds of assignment in the case are subjoined; they are lengthy, but the points assailed are so scattered through the deed, that they cannot be fairly presented, if the deeds are abbreviated.

" This indenture, made and entered into this thirteenth day of February, 1840, between the President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, of the first part; W. W. Frazier, Thomas E. Robins, and William S. Bodley, of the second part; and various other persons and corporations, creditors of said party of the first part, who may become parties to this deed in the manner herein provided, of the third part. Witnesseth, that the said President, Directors, and Company of the Commercial and Railroad Bank, in consideration of the sum of five dollars to them in hand paid, the receipt whereof is hereby acknowledged; and further, in consideration of the covenants, stipulations, and agreements herein contained, have given, granted, bargained, sold, transferred, and assigned; and by these presents, do bargain, sell, transfer, and assign, to the said W. W. Frazier, Thomas E. Robins, and William S. Bodley, and to the survivor of the said trustees, and to the heirs, executors, and administrators of such survivor, all the slaves, mules, oxen, carts, iron, wagons, and implements to work on the railroad, now building by said party of the first part, which said slaves, horses, carts, mules, oxen, and implements they are now using on, and upon said railroad, in finishing and completing the same. They also, for the consideration aforesaid, transfer and assign the profits of said railroad, from and after the registration of this deed, until said railroad is finally completed to Jackson, to the said parties of the second part.

" To have and to hold the aforesaid property and profits to the said parties of the second part, and to the survivor of them, and to the heirs, executors, &c., of said survivor. In trust, however, and upon the following terms, and conditions. Whereas the legislature, in incorporating the said Commercial and Railroad Bank of

Robins, et al. v. Embry, et al.

Vicksburg, by the fifth section of the charter, made it the imperative duty of the said Commercial and Railroad Bank of Vicksburg, to construct the railroad between Vicksburg and Jackson, and to keep the same in operation, and by the terms of said charter, if said road is not finished within six years from the first election of directors, the said charter is declared null and void ; and whereas the time has nearly arrived, when said road must, by the terms of the charter, be finished, and whereas it formed and constituted a part of the contract, as manifested in said charter, by and between the stockholders of said Commercial and Railroad Bank, that they would complete the said road, the making of which is declared to be the primary object in granting the charter ; and whereas, it is essential to the creditors of said institution, that said road should be finished by the time stipulated, otherwise the corporation will be dissolved, and all debts due to it, and from it, will be extinguished, and the road, as far as now made, be forfeited ; and whereas the profits of said road, will, if not wholly sufficient, greatly aid in paying the debts due by said bank, therefore the main and principal object of this deed of trust, is to secure to the creditors of said institution the benefit and advantages of said road, and by completing the same, afford facilities for the payment of the debts of said bank. Therefore, the said parties of the second part, are hereby declared to hold said property and profits herein transferred, in trust for all the creditors of said Commercial and Railroad Bank ; and, with a view more effectually to carry the provision of this deed of trust into effect, the said trustees are hereby declared to be the joint agents of the party of the first part, and of all the creditors of said Commercial and Railroad Bank, who become parties hereto, as herein provided ; and, as such agents, the said trustees are hereby authorized and empowered to take possession of said railroad, and control the same for the purpose of ascertaining and receiving the profits of said road, until it is finished and completed to Jackson, and they are hereby authorized and empowered to appoint and employ all necessary agents, engineers, hands, &c., and to purchase all necessary implements, property, engines, and provisions necessary to carry on said road, and to keep the same in repair, and in full operation, until it is finally

Robins, et al. v. Embry, et al.

completed. And the said trustees hereby stipulate to keep a full, accurate, and complete account of all the receipts and expenditures of the said road, and furnish the same semiannually to the board of directors of said Commercial and Railroad Bank; and it is further stipulated and agreed, that all the slaves, wagons, carts, horses, mules, oxen, and other property and implements, of every kind and description, now in possession of said party of the first part, and in use on said road, shall be possessed, retained, and used for the purpose of finishing said road, and the same shall be retained and used by said trustees for the benefit of all concerned, until said road is completed; after which time, said slaves, property, horses, mules, oxen, and other property, shall be sold by said trustees; provided, however, that said trustees shall have liberty, when they deem it necessary, to sell any of said property, before said road is completed, and purchase other if necessary in its stead, or they may exchange the same for other property, whenever they may believe it to be for the interests of all the parties concerned that it should be done; and said property, so purchased, or received in exchange, shall be held subject to the trusts of this deed; and it is hereby made the duty of said trustees, to appropriate the profits of said road, or so much of them as may be deemed necessary, to the finishing of said road; and the fund arising from the sale of the property herein conveyed, and the surplus profits, if there should be any, together with all the future profits of said road, after it shall have been finished (after first paying or deducting all the necessary expenses of this deed of trust), shall be the net proceeds or avails in the hands of said trustees, to be appropriated *pro rata* in payment of the debts of the party of the first part.

"And whereas the said party of the first part has this day, by deed, bearing even date with this, conveyed all of its property, choses in action, &c., except the property embraced in this deed, to the said W. W. Frazier, Thomas E. Robins, and W. S. Bodley, for the uses and purposes mentioned in said deed; and whereas said deed points out the manner and mode of notifying the creditors of said party of the first part, and also the manner and mode by which the creditors may, and shall, become parties thereto, and

Robins, et al. v. Embry, et al.

the manner and mode of dividing and appropriating the trust-fund among the various creditors of said party of the first part, it is therefore declared and agreed that the fund, arising under this deed of trust, shall be appropriated and divided among the creditors of the party of the first part, in the manner, and in the order, and according to the terms and stipulations, mentioned and contained in said deed of trust herein referred to. And it is hereby made the duty of the said trustees, to make publication at such times and places, and for such length of time, as will give to the creditors of said Commercial and Railroad Bank, notice of the execution of this deed of trust, and the one before referred to, and said trustees shall, by such publication, notify and require all the creditors of said Commercial and Railroad Bank, to file their claims within the time, and in the manner, pointed out in the deed of trust herein referred to, as having been executed this day by said party of the first part ; and the mode and manner of ascertaining the validity of claims pointed out in said deed of trust shall govern in this; and all the creditors who file their claims as required by said deed of trust, will be considered as parties to this deed of trust.

" In testimony whereof, D. Conyngham, president of the said Commercial and Railroad Bank of Vicksburg, by virtue of the authority in him vested by an order or resolution of the board of Directors of said Bank, hereto affixes the common seal of said Commercial and Railroad Bank of Vicksburg, for and on behalf of said corporation ; and he, by virtue of the authority in him vested, hath affixed the common seal of said corporation to this deed, as the act and deed of the said corporation, and as evidence thereof he also hereto subscribes his own name, and the said parties of the second part have also hereunto set their hands and seals this day and year aforesaid.

Witness, { Seal of } D. Conyngham, President.
W. W. Frazier, (seal.)

J. G. Bibby,

R. R. Robinson.

" This indenture, made and entered into on this the thirteenth day of February, in the year of our Lord one thousand eight hundred and forty, between the President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, of the first part; William W. Frazier, Thomas E. Robins, and William S. Bod-

Robius, et al. v. Embry, et al.

ley, of the second part ; and the various other persons and corporations, creditors of the said Commercial and Railroad Bank of Vicksburg, who shall be deemed parties to this instrument in the manner herein-provided, of the third part, witnesseth :

“ Whereas, the embarrassed situation of the President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, and the present inability of its debtors to meet their liabilities, place it out of the power of said corporation to complete the railroad, or to pay its debts, without having time to make collections ; and whereas, the unprecedented pressure which now rests upon the community, and the utter impossibility for said corporation to collect its debts immediately, without being destructive to the interests of its debtors, by causing a great sacrifice of their property, and without being destructive, also, to the best interests of the corporation, as such sacrifices on the part of its debtors will wholly disable them from complying with their engagements to said bank ; all of which causes render it necessary (in order that justice may be done to all the creditors of said corporation, and in order to complete the railroad, which was the great and primary object for which the charter was granted), that an assignment of the property, debts, and effects of the said corporation, should at once be made for the benefit of the creditors, as will most effectually promote the interest of the creditors of the institution, and protect its debtors from loss and sacrifice, and at the same time furnish means to finish and complete the railroad immediately, and to protect and secure to the stockholders of the said road the franchises granted by the charter.

“ Now, to effect the purposes aforesaid, this indenture witnesseth : that the said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, in consideration of the premises, and of five dollars to the said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, in hand paid, by the parties of the second part, the receipt whereof is hereby acknowledged ; and further, in consideration of the covenants, stipulations, and agreements herein contained, have given, granted, bargained, sold, assigned, and transferred and set over, and, by these presents do give, grant, bargain, sell, assign, transfer, and set over to said William W. Frazier, Thomas E. Robius, and William S. Bodley, and to the survivors of them, the said William W. Frazier,

Robins, et al. v. Embry, et al.

Thomas E. Robins, and William S. Bodley, and to the heirs, executors, administrators, and assigns of such survivor, all the property, real, personal, and mixed, which, either in law or equity, belongs to the said party of the first part, to wit : its real and personal estate of every kind and description, situate in the county of Warren, and State of Mississippi, or elsewhere ; its stocks, goods, wares, merchandise, bills receivable, bonds, notes, book accounts, claims, demands, judgments, choses in action, and all of its property of every kind and nature, whether enumerated and specifically mentioned or not. And the said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, for the consideration aforesaid, do also bargain, transfer, and assign to the said William W. Frazier, Thomas E. Robins, and William S. Bodley, and to the survivor of the said William W. Frazier, Thomas E. Robins, and William S. Bodley, and to the heirs, executors, administrators, and assigns of such survivor, all the surplus profits hereafter arising, or which may hereafter accrue from said railroad, from and after the time said road is finished and completed to Jackson ; that is to say, all profits which may thereafter be received over and above the necessary expenditures and disbursements of the road, including officers' salaries, &c., are to be received by said assignees ; and only such profits as may arise after the completion of said road are to be received by said assignees ; and, in order the more effectually to carry this provision into effect, the said trustees, or any hereafter to be appointed, are hereby declared to be the joint agents of the party of the first part, and of all the creditors of said corporation ; and, as such agents, said trustees are hereby authorized and empowered to take possession of said road and control the same, for the purpose of finishing and completing the same, and to receive the profits and issues thereof ; provided, however, that the horses, slaves, wagons, carts, mules, oxen, iron, engines, and implements of every kind now used in working on and constructing the railroad, are not thereby intended to pass to said assignees, and are hereby excepted out of the provisions of this deed : to have and to hold to the said William W. Frazier, Thomas E. Robins, and William S. Bodley, and to the survivor of the said William W. Frazier, Thomas E. Robins, and

Robins, et al. v. Embry, et al.

William S. Bodley, and to the heirs, executors, administrators, and assigns of such survivor; in trust, however, for the following uses and purposes, to wit: that the said William W. Frazier, Thomas E. Robins, and William S. Bodley, shall proceed in the manner that they may deem most for the interest of all concerned, to sell and dispose of, either at private sales or by auction, and to execute good and sufficient deeds, bills of sale, releases, and all other instruments of conveyance to effect a sale or transfer of the real and personal estate, goods, and stocks of said party of the first part herein conveyed, to such person or persons, and for such prices, as in their judgment may appear best for the interest of all concerned, and to collect and hold the proceeds of such sales, and also to collect and realize in money, the most that may be practicable from the bonds, bills of exchange, bills receivable, notes, claims, accounts, judgments, demands, choses in action, and profits of said railroad, from and after the time of its completion to Jackson, hereby transferred and assigned to them: provided, however, that said trustees shall in no case refuse to receive from debtors to said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, the bank-notes, checks, post-notes, certificates of deposit, and bills receivable, due from said bank or any of its branches, in payment of debts due to the said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg; provided, such debtor or debtors shall give sufficient security for the amount of his, her, or their liabilities, within twelve months after the registration of this deed of trust: and it is further stipulated, that, in all cases where security is not given as contemplated by the provisions of this deed of trust, by any of the debtors to said bank, it shall not be compulsory on said trustees to institute suit immediately; but said trustees are hereby empowered to sue for, to renew or give further indulgence, or to compromise or settle said debts, in such manner as will best secure the same, and upon such conditions, as in their judgment will be for the interest of the creditors of said bank. And said trustees are hereby declared to have power, in all cases of doubtful debts, to compromise and settle the same upon such terms as they may deem best for all parties.

And, from the proceeds of such sales and collections, the said

Robins, et al. v. Embry, et al.

trustees and the survivor of them, shall pay all just and reasonable expenses and charges of making and carrying into full effect this assignment, and the objects thereof ; in doing which, the said trustees are hereby authorized, according to their discretion, to employ one or more attorneys, agent or agents, who shall by them be paid, out of such proceeds, a reasonable compensation for their services. And it is further stipulated, that the said trustees shall retain for themselves, out of said proceeds, as compensation for their labor, trouble, and responsibility in the premises, at the rate of eight thousand dollars each per annum ; which sum shall be in lieu of all commissions, and be a full compensation for their several services ; and, out of said proceeds, shall also pay all the necessary expenses of the said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, in the management of said corporation ; and the residue of the proceeds of such sales and collections, and the profits arising from said railroad, from and after its completion to Jackson, shall be considered as the net avails or proceeds of the property, profits, and effects hereby assigned.

“ And whereas, it was the principal object of the legislature, in granting the charter to said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, that the railroad from Vicksburg to Jackson should be made and completed ; and whereas, if the said road is not completed within the time specified in said act of incorporation of said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, the charter will be forfeited, and the said road, as far as it is now made, will also be forfeited, and the profits thereof, which will eventually enable the said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, to pay their liabilities, will be wholly lost to the creditors, — therefore, with a view to prevent irreparable injury to the creditors of said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, it is hereby stipulated and agreed, that the aforesaid trustees shall, and they are hereby declared to have the power, and it is hereby made their duty, to borrow, in the name and on behalf of said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, from any person or per-

Robins, et al. v. Embry, et al.

sons, corporation or corporations, such sum or sums of money, as may be necessary, to complete said railroad to Jackson, provided said sum or sums of money, so to be borrowed, shall not exceed the amount of two hundred and fifty-thousand dollars; and should said sum of two hundred and fifty-thousand dollars, or any part thereof, be borrowed, the property and effects hereby conveyed and assigned are to be bound for the payment of the same, with all interest thereon. Therefore, in the first place, out of said net avails or proceeds, the said trustees or the survivor of them, shall pay off and discharge, in preference to all other claims or demands, such amount, not exceeding the sum of two hundred and fifty-thousand dollars, as may be borrowed by said trustees, from any person or persons, corporation or corporations, for the purpose of completing the railroad to Jackson. And, secondly, the said trustees, from said net avails or proceeds, which shall remain after the payment of said loans, if so made as aforesaid, for the purpose of finishing and completing said railroad, shall pay all the just debts, balances, and sums due, from the party of the first part, of every kind and description, and for the payment of which, the party of the first part is legally liable: provided, however, that no stockholder, who has paid in his stock, or any part thereof, shall be considered as a creditor, within the meaning of this deed of trust, for such stock so paid in as aforesaid; and should the remainder of said net avails, or proceeds, not be enough to pay off all the debts and liabilities of said party of the first part in full, then the same shall be by said trustees applied in such manner as to pay off *pro rata*, or in equal proportion, to the amount of each debt or claim; and should there be a balance, after payment of all the debts due by said party of the first part, then such balance is to be paid to said party of the first part; provided, however, that no creditor of the said party of the first part shall be entitled to be paid any part or portion of the net avails or proceeds aforesaid, except upon the terms and conditions hereafter stated. And whereas, it will be necessary for said trustees, in order to prevent a large accumulation of the net avails or proceeds as aforesaid, remaining upon their hands, to make stated dividends or apportionments among the creditors; and whereas, it is necessary for said trustees,

Robins, et al. v. Embry, et al.

when such dividends or apportionments are made as aforesaid, to know the amount of the indebtedness of said party of the first part, and to whom indebted ; therefore, it is stipulated, and it is hereby made the duty of said trustees to make publication, in such manner as will afford information to all creditors, and thereby notify all the creditors of said party of the first part, to file their claims, judgments, bills, bonds, notes, or other evidence of indebtedness, with said trustees or either of them, within twelve months from and after the registration of this deed of trust ; and all the creditors of the said party of the first part, who shall so file their debts or claims as aforesaid, shall be considered and taken to be parties to this deed of trust ; and at the end of twelve months from said registration, all the net avails or proceeds, after first paying the loan, should it be made, to complete the railroad as aforesaid, shall be divided equally, in proportion to the amount of each debt, among all creditors who have filed their claims as aforesaid. And said trustees shall, every six months thereafter, divide and apportion, *pro rata*, whatever net avails or proceeds may be on hand, among said creditors ; provided, however, that any creditor or creditors, who has not filed his, her, or their claims, or claim as aforesaid, may file the claims or claim, at any time afterwards ; but in such case, such creditor or creditors, shall only be entitled to a *pro rata* share of the succeeding dividends. And whereas, many debts or claims may be presented which are of doubtful character, or which may not be legally just, or which may have been paid, or which may otherwise be inequitable ; therefore, no claim or demand (other than the bank notes, drafts, bills of exchange, and certificates of deposit, of said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg) shall be considered as received, or filed with said trustees ; nor shall any claim or claims, other than those above enumerated, or any part thereof, be paid by them, unless the board of directors of said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, or a committee appointed by them, shall approve the same, by indorsing the same as valid : and it shall be the duty of each and every creditor or claimant, before filing his or her claim with said trustees, to present the same (unless the claim consists of bank notes, or drafts, or

Robins, et al. v. Embry, et al.

checks, bills of exchange, or certificates of deposit, issued by said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, or bonds made and executed by them as aforesaid) to the board of directors of said company, or to the committee appointed by them as aforesaid, for their approval. And in all cases when suit may be brought on any claim or claims, which have been rejected by said board of directors, or said committee, or on which they refuse or neglect to act, if the party or parties who hold such claim or claims shall notify the trustees, that suit has been commenced thereon, he or they shall be considered as a party or parties to this deed, from that time: provided he or they succeed in obtaining judgment against the said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg; and he or they shall be entitled to a *pro rata* share of the dividends from the time of the notification, if, as aforesaid, he or they obtain a judgment; but it shall be the duty of said trustees to go on, divide the net avails or proceeds in their hands, as herein provided, among all the other creditors, whose claims have been allowed. But if judgment shall be rendered against said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, in favor of said claimant or claimants, the proportion of said claimant or claimants, shall be applied and paid in full, out of the succeeding dividends, so as to make his or their share equal with all other creditors; provided, however, that in all such cases, the said trustees, and the claimant or claimants, may submit the matter to three arbitrators to be chosen by the parties, whose award shall be final and conclusive. And the said trustees are to have possession and control of the books, bonds, notes, choses in action, &c., of the said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, at the principal bank at Vicksburg, and at the branches thereof, so far as the same may be necessary, for them to collect and adjust; and the retention of the same, by the said party of the first part, in their banking-house at Vicksburg, and in the banking-houses of the branches of said bank, for the safe keeping of the same, and the convenience of all parties, will be considered as the possession of said trustees, and subject to their control, order, and direction. And it is expressly agreed, that the acts of a

Robins, et al. v. Embry, et al.

majority of said trustees, shall be the act of all, and as binding as if all had assented thereto: and the said parties of the second part, covenant, stipulate, and agree to, and with, the party of the first part, and with all and each of the creditors of the said party of the first part, who may become parties hereto, as is hereinbefore provided, that they will semiannually exhibit a statement of their accounts to the board of directors of the said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg: and it is further stipulated and agreed, by and between the said parties, that if the trustees herein named, or either of them, die, or refuse to act, then, and in either of said cases, the board of directors of the said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, shall have power to appoint any other trustee or trustees in place of such as have died or refused to act, and the said substituted trustee or trustees, so appointed (which said appointment shall be entered on the minutes of the proceedings of the said board of directors of the President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg), shall have all the power and authority of the trustees herein appointed, and shall be subject to all the responsibilities and duties belonging to the trustees, herein particularly named as aforesaid, in this deed of trust: and said substituted trustees shall be entitled to the same compensation as is herein provided to be paid to the said trustees herein named: provided, that in appointing new trustees, the said board of directors of the President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, shall have no power to change, alter, modify, or revoke any of the trusts hereby created; nor shall their failure or omission to appoint a trustee or trustees, when necessary, in any wise affect this trust, but the same may be supplied, if necessary, according to the rules which govern a court of chancery. Nor is the said board of directors to have power or authority in any manner to revoke this deed, or any part of it. Nor shall any appointment, or failure to appoint a trustee or trustees, in any manner give the board of directors of the said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, any control over this deed; and it is hereby declared to be the intention of the

222 SUPERIOR COURT OF CHANCERY.

Robins, et al. v. Embry, et al.

parties to this instrument, that the transfer of all the property, choses in actions, and effects, as before mentioned, is to embrace, and does by these presents include and embrace, all of the property, real and personal, choses in action, effects, &c., of the President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, at Vicksburg, and all their branches ; the proceeds of all judgments recovered by the said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, and all claims now in suit and not reduced to judgment, and such as may be in the hands of attorneys for collection, in the State of Mississippi, or elsewhere ; and the said claims now in suit, and which may be in the hands of attorneys or agents for collection, are to be prosecuted, and the proceeds thereof, together with the proceeds of such claims as are reduced to judgment, are to be collected and received by the said trustees, and applied in the same manner as is provided herein, for the application of the proceeds of the other property, choses in action, and effects, hereinbefore mentioned ; and said claims and judgment, &c., are to be subject in every respect to this deed, and the control of the trustees herein named, as any other claim is subjected to their control hereby. And it is hereby declared, that the provisions of this deed of trust are to apply, in all respects, not only to the principal bank at Vicksburg, but to all of its branches ; and this transfer embraces, and is intended to embrace, all the property of the said party of the first part (not herein excepted), whether situated in Mississippi, or elsewhere. But it is understood, that no property, the use of which consists in the consumption, as wood, coal, &c., is intended to be embraced or conveyed hereby ; and such property (together with that herein-before excepted) is hereby excepted out of the general provisions of this deed. And it is further agreed, that out of the proceeds of the property hereby assigned, the said trustees shall pay any debt or debts, for which any of the property herein assigned is bound, or on which a lien exists, either by operation of law, or by contract ; and such property, when so discharged from such lien, shall be, and is, hereby, vested in said assignees, for the purposes of this trust.

" In testimony whereof, David Conyngham, President of the said President, Directors, and Company of the Commercial and

Robins, et al. v. Embry, et al.

Railroad Bank of Vicksburg, by virtue of the authority in him vested, by an order and resolution of the board of directors of said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, hereto affixes the common seal of said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg, to this deed, for and on behalf of said President, Directors, and Company of the Commercial and Railroad Bank of Vicksburg ; and he, by virtue of the authority in him vested, hath affixed the seal of said corporation to this deed, as the act and deed of said corporation ; and as evidence thereof, he also subscribes his name hereto : And the said parties of the second part have hereunto set their hands and seals the day and year above written.

{ Seal } D. Conyngham, President.
{ of bank. }

Witness, W. W. Frazier, (seal.)
J. G. Bibby, T. E. Robins, (seal.)
R. R. Robinson. W. S. Bodley, (seal.)

W. G. Thompson, for the defendant in the demurrer.

In arguing this case on the part of the defendant, I shall endeavor to sustain the following positions : First, That a corporation has no power to effect such a purpose as was aimed at by the deeds of assignment, on which the complainants rest their claim in this cause. Secondly, That an attempt is made, by the deeds of assignment, to invest the assignees with several diverse powers and characters, which are wholly inconsistent and contradictory, forming an assemblage and combination altogether unknown to the law, and so involved and intermingled that they must all, of necessity, either stand or fall together ; and, Thirdly, That the assignment is of such a character as the law will not sanction nor sustain, as against creditors, either in the case of a corporation, or an individual debtor, in failing circumstances.

Let the nature of corporations in general be briefly considered. A corporation is the creature of its charter ; from that it derives its existence, its vitality, and capacities ; its powers are limited by the terms of its charter, and it can take nothing by implication, except what may be indispensable to its existence ; it is limited in the exercise of its powers to the mode and subject-matter prescribed ; it

Rohins, et al. v. Embry, et al.

can make no contracts except in relation to the specific purpose and objects for which it was created ; and when the charter prescribes the mode in which, and the particular agents by whom, its powers may be exercised, the corporation cannot act by other agents nor in different modes. The power granted by its charter is a trust deposited with the corporation, to be executed under its own authority and immediate direction, and is, therefore, not assignable. This view of the general nature of all corporations is fully sustained by the following authorities : — *Head v. The Providence Insurance Company*, 2 Cranch, 166 ; *Washington and Pittsburg, Turnpike Company v. Cullen & Crane*, 8 Serg. and Raw. 521 ; *Clarke v. The Corporation of Washington*, 12 Wheat, 54 ; *Goggler v. The Corporation of Georgetown*, 6 Wheat. 597, 598 ; *Dartmouth College v. Woodward*, 4 Wheat. 636 ; *Charles River Bridge Company v. Warren Bridge Company*, 11 Peters, 546 ; 2 Kent, Com. 299.

The construction of the railroad was the leading consideration with the legislature, in granting the charter of the Commercial and Railroad Bank of Vicksburg. The charter, in section 4, declares this to be the main object ; and the deeds of assignment state that the construction of the road was the great and primary object of the charter. It is in relation to this object, as the principal subject-matter of the charter, that certain powers are conferred on the corporation, and that the legislature designed those powers should be exercised. It is true, that banking privileges are conferred on the corporation, and the business of banking thus made a distinct subject-matter, in relation to which the institution was authorized to employ its corporate powers ; yet it was the intention of the legislature that the business of banking should be secondary, and auxiliary to the construction of the road. The charter, in section 5, declares that the grant shall be void, if the road be not begun and completed within a time prescribed. And this, evidently, shows the construction of the road to be the main end for which the corporation was created, and for which all its powers and privileges were granted. It is also apparent, from this clause of forfeiture, that it was not the intention of the legislature, that the corporation might exist and exercise its powers separated from, and independent of, the business of constructing the road. The stockholders in this institution were

not incorporated without reference, in the first instance, to any particular object, nor for all objects, generally, about which they might afterwards choose to exercise their corporate powers, nor for some special leading object, other than the construction of the road — and the privilege of constructing a railroad, subsequently, and by way of further grant, appended to the charter, as an afterthought, as a secondary consideration. The charter plainly points to the construction of the road as the holding principle of the corporation. Take this away, and the corporation immediately falls into a condition in which the legislature never designed it should have existence. For the legislature, certainly, did not intend to create a corporation with mere abstract powers ; and the law is clear, that a corporation cannot exercise its powers, except about the objects for which it was created, which the charter designates.

The construction of the road being essential to the existence of the corporation, it follows, of necessity, that everything, of whatsoever nature, pertaining to the corporation, which is essential to the construction of the road, is likewise essential to the existence of the corporation. And hence, although it is said that property is not, in general, of the essence of a corporation, it is plainly otherwise in this case, since the road could not be constructed without the corporation having the possession and control of capital or property. And as it was chiefly for the purpose of having the road constructed, that the powers and immunities generally of a corporation were granted to the stockholders, so it was for that purpose that a corporate character was given to the property they hold in common. And as the whole charter was made subject to forfeiture, on a failure to construct the road, it follows, that the property belonging to the corporation cannot hold its corporate nature apart from its being subservient to the construction of the road. It is plain that the corporation, mainly and substantially, consists of the privileges, immunities, and powers granted to the stockholders in relation to their common property, to enable them to employ it with peculiar advantages about the construction of the road. Let the nature of this assignment be now considered. The board of directors have relinquished and transferred from the corporation the business of constructing the road, and all the property belonging to the corporation to be devoted

Robins, et al. v. Embry, et al.

to that object in the hands of the assignees, and have also endowed the assignees with such capacities, as enable them to carry out the leading purpose of the charter, as fully as the corporation might do it, in the exercise of all the privileges, immunities, and powers granted by the charter. In other words, they undertake, by these deeds of assignment, to transfer from the corporators to the assignees everything which is of the essence of the corporation, to substitute them, virtually, under the charter, in the place of the corporators, to constitute them the takers and holders of all which the charter grants. Now, what is the whole essence of an incorporating act? Every charter is a grant, and necessarily implies a grantee. An act of incorporation is not merely a declaration of certain privileges, immunities and powers, without more; it includes, likewise, a subject who takes them. It is strictly an enabling act. It is, likewise, *sub modo*, a creative act, which can proceed only from the sovereign power; it is the giving existence, under a new and uncommon mode, in relation to specific objects, to certain individuals in a collective capacity. And, hence, a corporation is said to be the *creature* of its charter — an artificial being, created by law, having existence and vitality by virtue of the capacities and privileges which the incorporating act bestows on the individuals, who compose it, to be exercised in their collective capacity. An act of incorporation is an enabling act, and operates on the individuals who are the grantees of the charter, the recipients of what the charter bestows. And the creative power, implied in the sense in which a corporation is said to be the creature of its charter, is employed by the legislature, as the depositary of the sovereign power of the State, in the act of conferring on certain individuals such new and uncommon privileges and powers, to be exercised in a collective capacity, as constitute them a corporation. This would appear most plainly, if the incorporating act should specify the particular persons, who were designed to be incorporated. The capacities and privileges bestowed would, unquestionably, be considered personal. The implication would not be raised, that, inasmuch as the legislature had conferred a corporate capacity, for specific objects, on certain persons, as A, B, and C, therefore any other three persons may take and exercise the same. And these privileges and powers cannot,

Robins, et al. v. Embry, et al.

with reason, be considered any the less personal, when the incorporating act specifies the terms and conditions on which the benefit it confers may be taken, and points out the particular class of persons who may take it. Those who take the place, and bear the responsibilities, and perform the duties, of stockholders, constitute that class exclusively in this case. Again, every corporation, especially if created for some great public purpose, is made by the act of incorporation the depositary of a special trust. *Clarke v. The Corporation of Washington*, 12 Wheat. 54. As it is impossible that the confidence implied in a trust could be reposed in a merely artificial being, the creature of law, without reference to the intelligent moral agents who compose the corporation, it is plain that the corporate privileges and powers are personal.

Hence I conclude that the board of directors, when they substitute the assignees in the place of the corporators, assume to exercise the sovereign power of the State.

As it is manifest that the primary and controlling purpose in this assignment was to carry out the great object of the charter in the construction of the road, so it appears that the board of directors have undertaken expressly to clothe the assignees with all such corporate powers as were necessary for that purpose, — as to take and grant property, to obtain loans, to contract obligations, generally, and to sue (including a liability to be sued) on behalf of the corporation, and to hold in common all the corporate property, in perpetuity. The assignment expressly gives perpetuity to the body of assignees ; the right of filling vacancies being reserved to the directory. In order that a body of corporators may have perpetuity, it is not essential that the right of filling vacancies should be in the corporators themselves ; it may be lodged elsewhere, as in the case of most *quasi* corporations. Chancellor Kent, in his Commentaries, remarks, that “it was chiefly for the purpose of clothing men in succession with the qualities and capacities of one single, artificial, and fictitious being, that corporations were formerly invented. By means of the corporation, many individuals are capable of acting in succession, like one single individual, without incurring any personal hazard or responsibility, nor exposing any other property than what belongs to the corporation, in its legal capacity.” Such, precisely,

Robins, et al. v. Embry, et al.

was the purpose of the board of directors in this assignment. It will not do to reply, that the corporation still exists, and that it exercises all its powers through the assignees, who are its mere agents. The charter has constituted the board of directors the general agents of the corporation ; and the business of a corporation cannot be legally transacted by other agents, than those who are designated as such by its charter. To this it will not do to reply, that the board of directors is still continued in the corporation, and that their agency is exercised through the assignees, who hold their office by the appointment of the directory. The agents of a corporation, who are designated by its charter, cannot delegate their authority. But the board of directors have not only delegated their authority to the assignees, as sub-agents under them ; they have, by the terms of the assignment, forever relinquished to the assignees all control and authority over the business of the corporation. The positions I have here advanced, respecting the agents of corporations, are fully sustained by the authorities. I refer to Sugden on Powers, Law Library, vol. 13, p. 222, 223 ; *Combe's case*, 9 Rep. 756 ; *Clarke v. Corporation of Washington*, 12 Wheat. 54 ; *Tippetts v. Walker, et al.* 4 Mass. Rep. 597 ; *Emerson, et al. v. Providence Hat Manufacturing Company*, 12 Mass. Rep. 249 ; *Washington and Pittsburg Turnpike Company v. Cullen & Crane*, 8 Serg. and Raw. 521 ; *The Commonwealth v. The Trustees of St. Mary's Church*, 6 Serg. and Raw. 508.

From the necessity of the case, the corporation cannot act, except by agents ; and, if the charter does not designate them, the corporation, in order that its powers may not be ineffective, may appoint its own agents. The board of directors are the mere agents of the corporation, holding their authority under the charter ; and their powers and duties are precisely what they would be, if the charter had designated no agents, and they held their authority solely under the appointment of the corporation. *Bank of the United States v. Dandridge*, 11 Wheat. 78. The board of directors have undertaken here to assign away the business of the corporation, together with all its means of conducting it. I insist, that an agent, whose whole duty and power are limited to the managing and conducting of the business of his principal, has no authority, nor is it any part

Robins, et al. v. Embry, et al.

of his duty, to change or transfer the business, of which his principal has confided to him the management alone.

The conclusion to be drawn from this view of the case, cannot be evaded by replying, that the assignment has merely converted the means of the corporation into a trust-fund for the payment of debts, and that the assignees stand, in relation to it, as ordinary trustees, to whom are confided the custody, and control, and direction of trust-property. There is a manifest and material distinction between the cases. The end of the incorporating act, is the construction of the railroad. This was a special trust confided to the corporation, for the purpose of effecting an important public improvement. In order to the accomplishment of this end, the legislature employed its sovereign power, in constituting the company of stockholders a corporation, clothing them with such uncommon privileges and capacities as could be taken and held only from the sovereign power, and giving to the property, which they hold in common, the peculiarities of a corporate nature. How is it possible, that the conducting of this great work, which required the action of the sovereign power, should be blended with the duties and the powers of an ordinary trustee, whose title to the property he holds in that capacity is supported alone by the direct and certain use vested in creditors, and who takes the legal title for the single purpose of executing that use? The property, in this case, could not retain its corporate nature, except while the title was in the corporation; for it is only this connection with a corporation which gives to property a corporate nature; and whenever this connection is broken, the property loses its corporate nature. So, in this case, when the title passed out of the corporation, the property, which had belonged to it with a corporate nature, became, at once, of the common nature of property in general. And, as the property lost its corporate nature in the assignment, which passed the title out of the corporation, the assignees took it, divested of its former corporate nature; it went into their hands, having the common nature of property in general, and subject to the uses to which it was assigned, like ordinary property. As the connection of the property with the corporation, which gave it its corporate nature, was broken in the act of assignment, the corporation then stood, in relation to

Robins, et al. v. Embry, et al.

the property thus transferred, precisely as an individual property-holder stands, in relation to property which he has transferred. The case of an assignment of its property in trust by a corporation, for the payment of debts, differs in nothing from that of an assignment made by an individual debtor, for the same purpose. After the assignment, the property can have no more connection with the business of a corporation, in the one case, than in the other. It may, then, pertinently be inquired, Would an individual debtor, in failing circumstances, who happens to be the owner of sufficient property to effect such a purpose, be allowed to assign his property for precisely such objects as are aimed at by the assignment in this case? Where would his trustee find his authority to employ the property, assigned to him for the payment of debts, in conducting the business of a chartered company? Could he substitute himself, under their charter, in the place of that company, and, with the property of the debtor, carry out the objects for which they were incorporated? The assignees, in this case, are made, by the deeds of assignment, at one time, trustees for paying the debts of the corporation; and, at another time, they are made the agents of the corporation, for completing the great object for which the corporation was established. And their counsel, in their arguments in this cause, have given them these two characters; they have noticed them, all along, as being both trustees and agents. If they are really trustees, they must stand, in relation to the corporation and the property of the corporation, precisely as the trustee of an individual debtor would stand, in relation to him and his property. There is but one character of trustee for the payment of debts, known to the law. The relation which they bear to the corporation and the property of the corporation cannot be qualified, or in any way affected, in the smallest degree, by the charter of the corporation. They are not trustees under the charter; they have no connection with the charter; they must look entirely for their powers and duties to the general law respecting trustees for the payment of debts. I said they are made, by the deeds of assignment, both trustees for the payment of debts, and agents of the corporation for conducting its regular and appropriate business, for accomplishing the object for which the corporation was established.

Robins, et al. v. Embry, et al.

These are separate and distinct offices ; and there is not, necessarily, any connection between them. The assignees are not the agents of the corporation, in virtue of their appointment as trustees ; nor are they trustees of the corporation, in virtue of their appointment as agents. If they hold these separate and distinct offices jointly, it must be by separate and distinct appointments. But, are not these two offices inconsistent, the one with the other ? And can they be lawfully blended ? They certainly are blended in this case. We cannot notice these assignees as trustees for paying the debts of the corporation, without looking, at the same time, to their powers and duties as agents for carrying out the great object for which the corporation was established ; nor can we notice them as agents for carrying out the object of the charter, without looking, at the same time, to their duties and powers as trustees for paying the debts of the corporation. Now it is certain, the corporation cannot lawfully appoint the complainants to hold these two distinct offices jointly, unless it can appoint them to hold either one of these offices separately, and without the other : that is to say, unless it can make them its agents to carry out the object of the charter, clothed with all the powers of trustees for the payment of debts— or, make them trustees for the payment of debts, clothed with the powers of agents authorized to carry out the object for which the corporation was established. Now, in virtue of the one appointment, these assignees have the control and direction of the entire business of the corporation ; are authorized to accomplish the object for which the company was chartered : say, if you please, as the mere agents of the corporation : and, in virtue of the other appointment, they hold the title to all the means which the corporation possessed for accomplishing that object, and are independent of all interference, on the part of the corporation, in the management and application of those means. Now, these several powers and duties are all blended together in the agency (as it is termed) of these assignees : as much so, as if they were made the agents of the corporation by the deeds of assignment, without any provision for the payment of debts. Now, I ask, is it possible to conceive of any mode, by which the corporation could more effectually transfer and relinquish the business, and the duties, and the privileges, and the

Robins, et al. v. Embry, et al.

powers conferred and imposed upon it, together with the trust deposited with it? Objections cannot be evaded, by saying that, for one purpose, the assignees are agents, and that for another purpose, they are trustees. The two characters and the two offices are blended together in one person. The same person, who has the control and direction of the entire business of the corporation, as an agent, holds, as a trustee, the title to all the property which can be employed in accomplishing the object for which the corporation was established; and, as a trustee, is independent of all interference on the part of the corporation. Let this be called an agency, if it must be so: I ask, are the assignees the agents of the corporation in any other way, than as the corporation is the agent of the legislature? It is to no purpose to inquire, what the assignees may be lawfully authorized to do as agents, and what other things they may do as trustees. As trustees to pay debts, they cannot be authorized to carry out a great work for which it was necessary a charter should be granted: as the agents of a corporation, they cannot hold the title of all the corporate property, nor have the control and direction of the entire business of the corporation, in absolute independence of the corporation itself.

That the property of every debtor is directly and immediately subject to the claims of all his creditors, as soon as they become due, is the first great principle of the common law, in relation to contracts. On this perfect principle of justice and morality, as a broad and settled basis, are founded all the municipal regulations touching contracts of every country, which has adopted into its jurisprudence the general principles of the common law. The creditor, it is true, is not allowed to decide for himself upon the justice and legality of his own claim, and to seize unceremoniously on the property of his debtor for payment. For the just protection of debtors, the law has wisely erected tribunals, and ordained certain appropriate forms for ascertaining the validity of claims. The delay interposed by these forms is precisely that which is deemed necessary and right to be allowed the debtor, to enable him to prepare his defences. There is nothing limited with more precision, than the time which is allowed the debtor for this purpose. Excepting the time, which the law interposes, thus exactly

Robins, et al. v. Embry, et al.

limited, and for this single purpose the property of every debtor is liable immediately and directly, without any delay, for the payment of his debts. But it is said that the debtor is allowed to assign his property, *bona fide*, in trust for the payment of his debts, and yet every assignment for this purpose is, to some extent, a bindering and delaying of creditors. For what purpose, I ask, by what rules, and to what extent, has the great principle of the common law been relaxed in such cases? Common assignments in trust, are clearly an innovation upon the strict rules of the common law, and have been brought into use comparatively within a few years past. They were treated at the beginning as purely creatures of the courts of equity. And on what principle have they been sustained and encouraged? Certainly, not on any principle conflicting with the first rule, and the very foundation, of the common law. A court of equity will never screen a debtor's property from the ordinary course of the common law, for the purpose of giving delay, whatever use such delay may serve, be it even to prevent a sacrifice of property. Courts of equity at first sustained such assignments on the ground that they operated to secure an equal distribution of the insolvent's property amongst his creditors, on the principle that equality is equity. This privilege or indulgence to the debtor was presently extended, so as to embrace and combine with it another principle; that is, of making a preference among creditors. And although these two principles seem to be entirely contradictory, yet the latter soon found favor with courts of equity, on the ground that the debtor, possessing an intimate knowledge of the relative equities of his creditors, can make a more just distribution than the law. To enable the debtor to exercise the privilege of placing all his creditors on an equality, or of making preferences among them, some delay must necessarily be allowed. But beyond this object, equity does not relax, or in any way qualify, the strict rule of the common law. The authorities cited by the complainants' counsel, for the purpose of showing that creditors have not been unreasonably delayed by the assignment in this case, point to the time which may be allowed for begining to execute the trust. Some time must necessarily intervene between the making of the assignment, and the distribution of

Rohins, et al. v. Embry, et al.

the property. The correct rule, as to the extent of time to be allowed in such cases, is briefly stated by Mr. Justice Washington, in *Pierpont v. Graham*, 4 Wash. Rep. 200; and by Mr. Justice Story, in *Halsey v. Whitney*, 4 Mason's Rep. 413. The former remarks, that the object is to give the creditors time enough to learn all the facts of the case, and make up their minds. The latter says, "In all cases of this nature, a reasonable time must be allowed for the creditors to come in under any assignment. What is reasonable time, is matter dependent upon the particular circumstances of each case." It is not objected that unreasonable time is allowed the creditors to come in under this assignment. The circumstances of the case would not admit of less time than twelve months for that purpose, and to enable the debtor to exercise the privilege of ordaining the order in which the creditors shall be paid. But are the creditors, in this case, hindered and delayed in their demands, only for that purpose, and to that extent? Certainly not. The fund provided by this assignment, for the payment of debts, is the future profits of the road. This is to postpone creditors to an indefinite period. The construction of the railroad is purely a scheme of speculation; it may prove to be an unfortunate one. After paying annually twenty-four thousand dollars to the assignees, and defraying the expenses of constant repairs, it may be a half century, it may be a thousand years, before the debts of the corporation will be paid out of this fund. The corporation cannot alienate the railroad; it is a species of property which is not the subject of bargain and sale, on account of the interest the public have in it, and the special trust confided to the corporation, for the construction and the control and preservation of the road; and creditors can never resort to it for satisfaction of their claims. Equity will never so far alter the fundamental principle of the common law, as to allow an insolvent debtor to lock up his means in some intangible estate, and to hold off his creditors indefinitely, dependent upon the proceeds of such estate for the payment of their claims.

A debtor cannot prevent his property from being subjected to the payment of his debts, by merely shifting the legal title. Nor can he, as against creditors, convert any portion of his property into a

trust fund, set apart and consecrated to any special object, except that object be the single and direct one of paying debts. A failing debtor can assign his property in trust only for the purpose of securing the privilege which the law allows him, of placing all his creditors on an equality, or of making preferences among them. Before judgments recovered against him, he may sell his property, and apply the proceeds to the claims of such creditors as he may select ; or he may discharge the claims of selected creditors by a direct transfer of his property to them. It is on the same principle that the law allows him, instead of making a direct and absolute transfer of his property, to selected creditors, to transfer the use to them, assigning the naked legal title to a trustee, with power to execute the use. And the transfer of the use, in the latter case, must have the same degree of certainty as the law requires in the former. It is strictly by virtue of the property being devoted to the payment of debts, as fully as if a direct and complete transfer had been made to the creditor, that it takes in the hands of the trustee, who holds the naked legal title, all the peculiarities of a trust fund. It is because the use has gone from the debtor, and become vested in the creditor, that the trustee can protect the property while he executes the use. The trustee's power over the property is supported altogether by the use, which is vested in the creditor ; it can rest upon nothing else. If the use is not a valid one, neither is the title. If the use has not that degree of certainty which the law requires to ascertain the title to property, the legal title in the trustee is void ; and the use must be ascertained and declared at the time the trustee takes the legal title, otherwise there will appear nothing to support it ; for as the use is protected by the title, so the title is supported by the use. The legal title in the trustee is only a means, an instrument, to serve the purpose of the use. It is limited by the use, and cannot extend beyond it. It has no force nor vitality for anything, except that to which the use calls it. It was made to follow the use.

Does the assignment in this case confer on the assignees only such powers as are necessary to execute the uses of the property, as vested in the creditors of the corporation, and devoted exclusively and directly to the payment of debts ? I think not. It is

Robins, et al. v. Embry, et al.

plain, by the language of the deeds, that the first and principal object was to provide a sure means of effecting the construction of the railroad ; and it is expressly stated, that the profits of the road, after its completion, are to constitute the fund for the payment of debts. The assignees are directed to proceed to collect the debts owing to the corporation, and to make sales of the property, both real and personal estate, belonging to the corporation, at their discretion, and to apply the proceeds of such collections and sales, in the first instance, to the construction of the road, and not to the payment of debts, until after the completion of the road. And let it be observed, that the property, which the charter authorizes the corporation to take and transfer, is expressly declared to be such as may be necessary to carry into effect the main object for which the charter was given. And so, when the assignees are directed to continue the construction of the road, and to retain possession and control of the road after its completion, until out of the profits all the debts shall be discharged, they are thereby directed to retain all the corporate property in their possession, for the same purpose, and the same length of time. Hence it is manifest, that the payment of debts is not the direct, primary, and leading purpose of this assignment. The whole interest of the corporators, in this matter, was to carry out the main object of the charter. For if that should fail, the charter itself must fail, and with it all the benefits it conferred. The main object of the charter was the construction of the road ; and that is the leading purpose of this assignment. To that object the assignees are directed to devote, in the first instance, all the property belonging to the corporation. The corporators evidently looked for their greatest interest under the charter, to the construction of the railroad, as an unalienable, intangible, and perpetual source of income ; and it is very plain, that, by this assignment, they adopted the most direct and complete method of protecting, and securing their entire interest ; that this was the primary and leading purpose of the assignment, the work first to be accomplished by the assignees, and to which the entire means of the corporation were to be applied ; and that the consideration of the creditors' interests was set in the background of this scheme, far behind the other greater and paramount consideration.

All the means of the corporation are devoted, in the first instance, exclusively to protect and firmly establish the entire interest of the corporators, as fully as if there were no debts to be provided for, whilst the creditors are postponed to an uncertain and indefinite period, held off for the affairs of the corporation to take the ordinary course of business, as though there were no compulsory power in the law. The case differs in nothing from that of an individual holder of a large property, who, on becoming embarrassed, should make an assignment of all his means to certain trustees for the purpose, in the first place, of investing the whole or the larger portion of his property in some great scheme of speculation, or of erecting therewith some extensive manufacturing or other productive establishment, directing the trustees to superintend and control the business, and, after defraying the expenses of a host of necessary agents, to apply the profits of the establishment, as they should arise, annually or semiannually, to the payment of his debts, and to retain possession of the establishment, until all his debts should be paid off, out of the profits. Would not the interest of the debtor be considered the leading purpose of such an assignment? A failing debtor cannot provide for his own interest, by a deed of trust, except as subsequent and secondary to the interests of his creditors. In this case, the interests of creditors are deferred and made secondary to the interest of the corporators. And the legal title of the property vested in the assignees is supported, if at all, principally by the use reserved to the corporators. But it is the use which is vested in the creditor alone, that supports the legal title in the trustee; and that use cannot extend the legal title beyond itself, so as to make it cover another distinct and independent use.

But it is said, that the assignees are directed to appropriate the profits of the road to the payment of the debts of the corporation, and that thus the creditors take, ultimately, the use of all the property which is devoted to the construction of the road. I contend, that it is no more within the power of the corporation to assign away the profits of the road, than to alienate the road itself. The interest which the State, or public, has in the road, is of the nature of an incorporeal hereditament; but the road, in respect of the

Robins, et al. v. Embry, et al.

property which the corporation has in it, is real estate, and the title is a fee-simple. The charter declares that the corporation shall hold and possess the land, purchased for the site of the road, in fee-simple. The property of the corporation in the road cannot be distinguished and separated from the property it has in the land, which forms the site of the road. There is no distinction, in law, between a grant of the profits of land, and a grant of the land itself. A grant of the profits is a grant of the land. *Cruise's Dig.* 4, p. 284; *1 Inst.* 4, b; *Co. Litt.* 46; *Plowden's Rep.* 524; *1 Saund. Rep.* 186, c; *Doe v. Brasier*, 5 *B. & A. Rep.* 125; *Green v. Belcher*, 1 *Atk. Rep.* 506; *Trafford v. Ashton*, 1 *P. Williams*, 418. It will be observed, that the use and occupation accompany the profits of the road in this assignment. It is impossible that anything more can be wanting to pass the entire property of the road. But how can the corporation grant the profits of the road, together with the use and occupation, when it has no power to grant the road? It is an impossibility, in law, that the corporation may have the property of the road, while the assignees take the profits in trust for the creditors. But allowing, for argument, that the corporation retains the property of the road, it is certain that the assignees, at the least, have the usufruct; nothing less can be included in a grant of the profits. But is such a thing known in the law, as that a man may grant the use of his land to another, and yet hold the land himself? If such a conveyance were good, the statute would, unquestionably, execute the use. No case could be brought more fully within the statute of uses. This cannot be regarded as a covenant to stand seised to uses; because, the only consideration that can support a covenant, to stand seised to uses, is wanting here. And the statute always executes the use where there is a covenant to stand seised. Here is an impossible condition of title, for another reason, even upon the supposition that the corporation holds the property of the road. Let it be granted, that the assignees have taken only the use, which they hold in trust for the creditors, and that the fee, or property of the road, remains in the corporation. What is the conclusion? There arises a clear case of a use limited on a use; which, so long ago as the decision of *Tynell's case*, was ruled to be void. At the most, this can only

Robins, et al. v. Embry, et al.

be regarded as a personal covenant, on the part of the corporation, that the creditors shall have the future proceeds of the road. Is there a sufficient consideration here to support a covenant? And can the personal covenant of an insolvent debtor be deemed sufficient to hold off his creditors from pursuing their remedies at law upon his property?

I think I have now shown that so much of the property of the corporation, as the assignees are required to appropriate to the constructing of the road, has not been, directly or remotely, assigned to the creditors; that to that extent there is a reservation in favor of the corporation. It is manifest that a very large proportion of the property, belonging to the corporation, was required for the completion of the road. Furthermore, the assignees are required to defray the expenses of the corporation out of the property assigned; and the creditors have not the meagre satisfaction of knowing what amount is intended to be appropriated in this way. The provision in reference to this object is indefinite and vague, and left open to be ascertained and settled between the corporation and its agents — as the assignees are several times expressly styled in the deeds, and in reference to some of the most important powers conferred on them. The corporation has reserved the power of filling all vacancies that may occur in the body of assignees; and in the exercise of this power, it may exert over the whole property a controlling influence most injurious to the interest of the creditors. Quære, does not this reserved power, to vest the title of the property in the future appointees of the corporation, necessarily imply a power to take back the property, upon the death or resignation of the assignees? And does not this render the whole assignment invalid, as against dissenting creditors, for not being absolute and unconditional? The reservation of this power over the title of the property may justly be regarded as a confirmation of one of the views, which I have already presented of the character of this assignment, as showing it to be illegal and invalid, that is, that the corporation is attempting, by means of the assignees, as its mere agents, to exercise a full control over all its property, in employing it about the objects for which the corporation was created, — thus exercising a power which the charter does not give, and holding off the creditors by the inter-

Robins, et al. v. Embry, et al.

position of a mere name. Again, the assignees are directed to borrow, in the name of the corporation, a large sum of money, two hundred and fifty thousand dollars, to mortgage the property of the corporation for the payment of it, and to apply this sum to the direct benefit of the corporation. What is this but a reservation of a controlling power over the property to that amount, to be exercised by the corporation, through the agency of the corporation? Several cases have been cited, in argument, from the books, to show that a failing debtor, assigning his property for the payment of debts, may authorize the trustee to make appropriations, and to borrow money, for the purpose of completing any improvements, and other works of that nature, which had been undertaken by the debtor, when it would manifestly be for the interest of the creditors by enhancing the value of the whole trust fund. The attention of the Court has been directed to the case of the Hat Manufacturing Company, reported in Serg. and Raw., in which the trustee was directed to purchase additional articles, and have them worked up with the stock of materials on hand; and other cases of assignments of a like nature, which have been sustained. Granting it may be shown that a failing debtor has been allowed, in some cases, to exercise over the property he has assigned a power so dangerous, if indeed not unwarranted by sound principle, there is no resemblance or analogy between any case, which can be cited for that purpose, and the case before the Court. In all such cases, the whole of the assigned property, including the portion for which appropriations were authorized to be made, was directed to be sold for the payment of debts. But here the appropriations complained of are for the construction of the road, which cannot be sold, neither by the trustee nor by the process of the law, nor can the corporation alienate it. An assignment in trust for the payment of debts cannot be sustained, if the debtor reserves to himself the use of any portion of the property, nor unless he relinquishes, by the terms of the assignment, all power of control over the property. For all such reservations must be, in the very nature of things, inconsistent with a transfer of the title to a trustee, to execute the uses of the property, as vested, directly, absolutely, and unconditionally, in the creditors. The title, which is held by the trustee, can be supported by nothing else

Robins, et al. v. Embry, et al.

than the uses of the debtor's property vested in his creditors ; if it is not supported by that, entirely and exclusively, it must fall.

I contend, further, that this assignment cannot be sustained, as an assignment in trust, for the payment of debts, or for any other purpose whatever, for want of a sufficient description of the property intended to be assigned. Numerous cases have been cited by the complainants' counsel, to show that a schedule of the property is not indispensable in an assignment for the payment of debts. It will be found, I think, after a full examination, that in all the cases on this point, which are entitled to any weight of authority, it has been decided that an assignment in trust is void, unless accompanied either by a particular schedule of the property assigned, or by marks of identity by which it may readily be recognized, or unless there is, at the least, an express stipulation to furnish a schedule, as soon as may be done after the execution of the deed, in order that creditors may, within the time allowed them for coming in under the assignment, have all necessary information of the amount and description of the property assigned. Here the creditors are left wholly in the dark on that point. I understand the reason of the rule requiring a schedule in these cases to be, that creditors may be furnished with all practicable means of judging of the fairness of the transaction, and of making up their minds whether they will assent or refuse to come in, and that the trustees may be held to an exact account of all the property they received. By the assignment the creditor is cut off from the ordinary, direct recourse, which the law gives him, on the property of the debtor. The debtor is permitted to set apart his property, in the hands of a trustee, for the sole use and benefit of his creditors. The trustee takes it covered with the interest of the creditors. And shall it be said that the creditors may be held off from all knowledge and inspection of this their interest, while it is managed for them exclusively by the debtor and an agent of his own selecting ? How could that be considered an equitable and reasonable substitute and exchange for the direct recourse, which the creditors had on the property of the debtor ? How could that be treated, at all, as a mode of providing for the interests of the creditors ? Allowing that the trustee is disposed to act with fidelity towards the creditors, he is compelled to trust alone

Robins, et al. v. Embry, et al.

to the honesty of the debtor in disclosing and delivering up the property assigned. And if the creditors are not furnished with the means of ascertaining what amount of property has passed into the hands of the trustee, how can they ever provide any ground or data for proceeding to hold him accountable for the manner in which he executes the trust? They are told to resort to the court of chancery. The doors of chancery are never open to those who come groping in the dark. Nor will the suggestion be tolerated, that a debtor may cut off his creditors from direct recourse on his property at law, and compel them to put up with such means of looking after their interests as may be extorted, through a court of equity, from the reluctant conscience of the debtor, and whatever agent he may be pleased to interpose between his property and his creditors. This, indeed, would often prove a more successful method of hindering and delaying and defrauding creditors, than ever a debtor would have the boldness to attempt by express provisions in the deed of assignment. The correct rule, as to the time to be allowed in such cases, as stated by Mr. Justice Story and others, I have already mentioned, that to enable the debtor to exercise his privilege of placing all his creditors on an equality, or of making preferences among them, a reasonable time, which is a matter dependent on the circumstances of each case, is necessary for giving the creditors an opportunity to make up their minds about coming in under the assignment. And how can they do this, without being furnished with some certain means of informing themselves concerning the nature and extent of the provision, which the debtor has made for their interests? The means of obtaining such information should be furnished equally to all the creditors, without distinction. But if there be nothing in the deed, or accompanying it, to point out the property assigned, and the creditors are compelled to resort for information to the debtor and his agent, it lies in their power to influence the determination of the creditors, according to their own purposes, by making disclosures of one character to favored creditors, and of a different character to all others, and thus to retain, perpetually, the power of making preferences; which, of itself, would render the assignment void, whether this power be reserved to the debtor himself, or be conferred on the trustee. It is said, for the com-

Robins, et al. v. Embry, et al.

plainants, that in assignments by banking institutions, a description of the property will not be required, on account of the inconvenience arising from its very great variety, &c. To this I have only to reply, that if there be anything worthy of consideration in the views I have here presented on this point, surely the greater the amount and variety of the property assigned, the greater is the necessity of furnishing to the creditors some certain means of informing themselves concerning it.

There is an express reservation in this assignment of so much of the property as may be required to defray the expenses of the corporation. What amount that may be, is known only to the corporation and to the assignees. I think I have shown that so much of the property as the assignees are directed to appropriate to the constructing of the road, has not been assigned, either directly or remotely, to the use of the creditors; and by all that appears, much the larger part of all the property may have been required for that object. And hence it is very clear, that only a part, and it may be a small proportion, of the property of the corporation has been assigned to the use of the creditors. If a man grants a part of his estate, without description, the grant is void, for uncertainty in the thing granted; for there is nothing by which it may be distinguished from his other property.

It is said, for the complainants, that the fourth section of the charter, which authorizes the corporation to transfer and alien its property in any way for the purpose of constructing the road, gives to the corporation a full and exclusive power over its property for that object, and creditors have notice of this, as the charter is declared a public law. This is certainly a very strained construction of the terms employed in this section of the charter, which, by a natural and plain construction, gives to the corporation merely the power to trade and contract generally with and concerning its property, in such ways as may be necessary, in order to use it as a capital for the construction of the road, — and not the power to lock it up meanwhile from the reach of creditors. For, since the road is not the subject of sale, this were to give the corporation a power to contract debts, and that on the faith and credit of its property, under the clause in the charter which declares that the corporation

Robins, et al. v. Embry, et al.

shall be bound for the redemption of its issues, and yet to deny to creditors the right of enforcing payment by a resort to the property of the corporation. The Court will not listen to a proposition which imputes to the legislature a design at once so ridiculous and unjust.

I think I have now shown clearly, that the claim set up by these complainants cannot be sustained, according to the general principles of the law relating to assignments in trust for the payment of debts.

The counsel for the complainants have contended that the building of the railroad was the subject of a contract between the corporation and the government, for the use and benefit of the public ; that this contract was as obligatory on the corporation as any of its other contracts, to pay money or what not ; and that the corporation might lawfully convey its property in trust, to the exclusion of general creditors, to enable it to comply with that contract. There may be some plausibility in this view of the case, but when closely examined, it will certainly be found erroneous and untenable. This is not a mere conveyance of property, for the purpose of securing and appropriating such means as might be necessary for completing the construction of the road. If this were the whole, or the principal object, why did not the corporation make a direct sale or mortgage of its property to some capitalist, who would furnish the desired means ? But that is not, at all, the character of this assignment. The mere transfer of the property to the assignees is only a small and inconsiderable part of it. The leading purpose was to enable the assignees to carry out the object, to do the work, for which the corporation was created, and which the legislature confided as a special and important trust to the corporation. I think I have already shown that the corporation cannot exist separated and apart from the business of constructing and preserving and controlling the railroad. But it was the leading purpose of the assignment to transfer all this business ; and the property was transferred only as auxiliary to that object. The transfer of the property is a mere shadow, and to no conceivable purpose, if considered apart from the transfer of the business of the corporation. It is not true, that the corporation has transferred its *property*, to enable

Robins, et al. v. Embry, et al.

it to comply with its contract with the State. The *contract itself* is transferred. And I think I have already shown, that that which the complainants' counsel consider the subject of a contract between the corporation and the State, is the holding principle of the corporation. If it be withdrawn, the corporation can no longer stand together. And the work or business, which forms the subject of this supposed contract, cannot be lawfully conducted by another, nor by any number of persons, because it cannot be performed, as the charter requires, without a grant from the State of such immunities and powers as would constitute them a corporation.

But is this, indeed, a case of a contract between a corporation and the State, in regard to which the corporation may secure the State by an assignment of its property, which places it beyond the reach of general creditors? It is said, that the corporation came under an obligation to the State to construct the road for the convenience of the public; and that the consideration moving from the State, was the corporate franchises granted to the stockholders. The legislature contemplated the railroad as an object of benefit, equally to the public and the corporation. The public was to have the convenience of travel; the corporation was to have the property of the road; it was authorized to purchase land for the site of the road, and to hold and possess the same in fee simple; it was to regulate the tolls, and receive all the profits of the road; it was to have an indefeasible right to the property of the road: the road was to remain the property of the corporation, so long as the corporation should exist; for, in regard to the construction and the subsequent preservation and control of the road, the corporation was made, under its charter, the special depositary of an important public trust.

The consideration moving from the State, and the benefit to be taken by the corporation, were thus united in the same object. The State, by a grant of the corporate franchises, secured a benefit to the public; and the corporation, by effecting a convenience of travel for the public, secured a benefit to itself. It was only while benefiting the public, that the corporation could take any benefit to itself, under the charter. It was in the act of using the privileges conferred by the charter, that the corporation was to benefit the

Robins, et al. v. Embry, et al.

public : in other words, the consideration moving from the State, carried, in itself, the benefit the corporation was to give to the public. If the corporation failed to benefit the public, it could only be because it failed to exercise the powers conferred on it by the State ; and when it failed to use those powers, there ceased to be any consideration moving from the State ; for, the consideration moving from the State, was the benefit the corporation was to have in the exercise of the privileges and powers granted by the charter. How, then, can this be regarded as a contract, in any such sense as is contended for ? How can it be regarded otherwise than as a privilege bestowed on the corporators, in consideration of the benefit, which would, of necessity, arise to the public, in the use and exercise of that privilege ? The legislature, by the terms of the charter, made it impossible that the corporate privileges and powers could be exercised, except for the benefit of the public. There could be no possible inducement to use them otherwise ; for the charter would be forfeited, and the corporation would lose all the property it had acquired, if the railroad was not commenced within two, and completed within six, years. For, so far from there being an absolute consideration passing from the State, for which the corporation became indebted to the public, in the way contended for, the corporation is subjected to a forfeiture, in the event of its failing to effect the proposed benefit to the public, which would overbalance, in loss, all the benefit it had received by the charter. In one way it is true, but very different from that contended for by the counsel of the assignees, the corporation did come under an obligation to the government, and, through the government, to the public, in consideration of the benefit bestowed upon it under the charter : an obligation to do the work ; to execute the important public trust specially confided to it, which, by this assignment, is transferred to the assignees.

It is said, that, in consideration of the State's enabling the company to employ their capital stock with certain corporate privileges and powers, the company came under an obligation to construct the road ; that, in respect to this object, the corporation became a debtor to the State, and the State became a creditor of the corporation ; and it might well take a lien upon all the property of the

Robins, et al. v. Embry, et al.

corporation to secure its claim. The State contributed nothing to the capital stock of the corporation ; and it was only on the condition of constructing the road, that the company received the corporate privileges and powers conferred by the charter : so that, if the road failed to be constructed, the State could lose nothing ; and had, in fact, parted with nothing, neither money nor anything else. But how was the company to effect the construction of the road ? Only by means of the general power which the charter gave it, of trading and contracting on the faith and credit of its capital stock. This was made a banking corporation ; and the privilege of banking was unquestionably given to facilitate the construction of the road. The corporation was enabled to deal with its own issues, in the place of actual money ; and, in all its contracts, it became a debtor to every person dealing with it, on the faith and credit of its capital stock, whether existing in actual money, or in the property which the corporation may have purchased. The corporation was authorized to operate on a capital of four millions, and to issue promissory notes to an amount three times greater than its capital. The position taken by the counsel for the complainants, then, amounts to nothing less than this : the State, although it has parted with nothing, may rightly hold a lien upon all the property of the corporation, for securing the construction of the road for the accommodation and convenience of the public, while individual creditors, who may hold claims to the amount of twelve millions, shall be held off, although their claims may have originated on the faith and credit of that property, and under the sanction of the express guaranty of the charter, which says, that the corporation shall be bound for the redemption of its issues ; and, moreover, notwithstanding these debts were contracted by the corporation, in the course of carrying out the very object for the securing of which the State is represented as having a right to hold a lien on all the property of the corporation, to the exclusion of the general creditors. A mere statement of the proposition is enough to refute it.

George S. Yerger, for complainants.

1. The question is well settled, that a corporation, like an individual, may make a *bona fide* assignment of its property, for the

Robins, et al. v. Embry, et al.

benefit of its creditors, and therein give such preferences as it chooses. And such assignment, although it may disable the corporation from discharging the ordinary purposes of its institution, yet it still remains a living corporation. 6 Gill & Johnston's Rep. 205, 363 ; 6 Conn. Rep. 233 ; 8 ib. 505 ; 5 Peters, Rep. 651 ; 1 Watts, Rep. 385 ; 2 Stewart's Rep. 401 ; Case of Real Estate Bank of Arkansas, in pamphlet.

Its existence, after such assignment, is absolutely necessary ; its name must be used in the collection of debts, judgments, &c., and in suits against it to establish demands which are refused to be paid. Vide same authorities.

And although the intent may actually exist, to prevent a particular creditor from seizing the property and acquiring a lien by judgment, that does not make it fraudulent, if its whole property is devoted to its debts *bona fide*. 6 Gill & Johnston, 218 ; 3 Mau. & Selwyn, 371 ; 1 Binney, 516 - 523 ; 4 Mason's Rep. 211, 212 ; *Broshem v. West*, 7 Peters, Rep. 313.

And notwithstanding such an assignment may *delay* and *hinder* creditors in their remedies, it is not on that account fraudulent. An actual fraudulent intent must exist, and be proved, or appear on the face of the instrument. 2 Paige's Rep. 490 ; 16 Peters, Rep. 374 ; 9 Pickering's Rep. 410.

2. It is said, in this case, the description of the property is not sufficient. The *deed assigns* all its *property*, debts, &c. All that belonged to it necessarily passed. The trustees may be called on to set out, specifically, the property, &c., received by them, in order to make them account ; but in all cases such description is sufficient. Case of Real Estate Bank of Arkansas, in pamphlet ; 6 Gill & Johnston's Rep. 366 ; 4 Bibb. 289 ; 4 Mason, 206, 218 ; 2 Sumner's Rep. 278 ; 4 Peters, Con. Rep. 684 ; 5 Wheat. 359.

In case of assignments made by banks, no other description can well be given, so numerous are its various notes, bills, &c. But if a part of the property is not described with sufficient certainty, the deed is certainly good for that which is described, and the property levied on in this case is described as all its real property in Mississippi. This is sufficient without further description. 4 Comyn's

Robins, et al. v. Embry, et al.

Digest (Am. ed.), 154 ; Fait, E. 4 ; ib., Title Grant E., 1, 2, 3, &c.

A grant of all a man's land, in a particular county, or State, is sufficient. Comyns's Digest, Fait, E. 4 ; 4 Bibb, 289, *Jackson v. De Lancy* ; 13 John. Rep. 537. The latter case was a grant "of all my lands in the province of New York" ; held, that all passed.

Is the deed, upon its face, *fraudulent*? It is said, it is. 1st, Because it attempts to vest the assignees with inconsistent and conflicting duties. 2d, Because it was a principal object, in making the assignment, to finish and complete the road, and appropriate part of its means in doing so ; that this was appropriating the property conveyed, to its own use, &c. 3d, Because there is no schedule of property annexed to the deed. 4th, Because the uses are not declared in the deed. 5th, Because the assignees, in regard to the road, are declared, in the deeds of trust, to be *joint* agents of both parties, that is, the creditors and the bank, *and thereby retain a control over the property conveyed*. 6th, Because the bank retained the power to appoint trustees, in place of those who died, or resigned, instead of going into chancery. 7th, Because the property is locked up from creditors an unreasonable length of time. 8th, Because the directory retained the power to ascertain what claims were of value, &c. 9th, That they had the right to compromise doubtful claims. 10th, Because the assignment was made on condition.

Many of these objections do not exist, in point of fact, and those that do so exist are perfectly legal, and sanctioned by the law.

It is admitted, that the two great and leading objects, in making the assignment, were,

1st, To procure means, by a pledge of its property, to finish the road ; and

2d, To devote *all the profits of the road*, when completed, and all its property, to the payment of its debts, giving a preference to the debt created to finish the road, and requiring it to be paid in the first instance.

If these objects, or either, are illegal, then is the assignment

Robins, et al. v. Embry, et al.

illegal. If they are authorized by the law, then the assignment is valid.

The want of a thorough knowledge of the common law, as applicable to charters of this kind, has misled the Supreme Court of Louisiana. Their opinion is based altogether upon erroneous principles ; and the principal cases relied on by that court, and the counsel in this cause, to sustain their objections to the assignment, are wholly inapplicable.

Let us first see the nature of the trust confided to the corporation, and their power over its property, and particularly over the road. This will explain what is meant by the assignees being joint agents, &c. The building of the railroad was a great public improvement. It was the primary object in granting the charter. (See sec. 4 and 5.) The public have an interest in the road as well as the individual corporators. Hence, although all its other property is alienable, absolutely, yet this is not : it could not be sold under execution. 13 Serg. & Rawle, 210, 211.

Hence, also, private property could be taken, upon being paid for, because it was taken for public use, in constructing the railroad. 1 Rice's Rep. 338 ; 3 Paige, 45 ; 59th No. Am. Jurist, Jan. 1840, page 434 ; 2 Dev. & Battle, 451.

It was, moreover, the duty of the bank to finish it, and keep it in repair.

From this, it is evident the bank could not mortgage the road itself, or convey it by deed of trust. If it could, the mortgage would be foreclosed, and the road sold. All that it could do, was to mortgage the profits ; this is all that the creditors in equity could get.

When the profits were only mortgaged, the bank necessarily retained possession of the road ; but it could only keep it up and run its cars, by means of agents, for a corporation can only act through its agents. If there was no mortgage, the agents who received the money would have to account to the bank. But after the mortgage of the profits he would have to pay them to the mortgagee, and equity would compel him to do so ; or, if he paid them to the bank, the bank would have to pay them over.

Now, when the trust was made, and complainants were made

trustees, to receive the profits of the road, this made them agents or trustees of the creditors, to receive from the bank the profits. And the bank, instead of appointing other persons as its agents, to finish the road and keep it in repair, appointed the trustees for that purpose. Hence, they are the joint agents of the bank, and the creditors. They are agents of the bank in finishing and keeping up the road, and retaining possession for it, and they are agents for the creditors, in appropriating the surplus profits — to the payment of their debts.

The deed shows, expressly, that this joint agency only applies to the road, and does not extend to any other property. *Vide* page 2 and 3, of the assignment and the supplemental assignment.

The bank, therefore, has possession and control of the road, by *its agents*, for the purposes of completing it : it could not part with the road itself ; but it has no control over the profits ; on the contrary, the deed states, as to all the property, profits, &c., it has no control whatever.

3. But suppose the bank had no power to create this *joint agency*. Does this render the deed fraudulent ? Not at all. The assignment of all the property and profits is valid, and the mere want of power to constitute the assignees joint agents, or agents for the bank, in nowise impairs the trust, if, in the exercise of the agency, no control is retained over the property assigned. It only proves that the bank must employ other agents on the road, and let them pay over the profits to the assignees. 10 Pet. 360. It is a question of power, not of interest.

4. It is again said, the bank cannot sell or mortgage its privileges, to make the road ; and the case of *Clark v. Corporation of Washington*, 12 Wheat. is cited. True, the bank could not sell franchises, but it surely could employ agents to finish building the road. *It now holds the road, and only pays over the profits.* The franchise is not assigned.

The duties, therefore, of the assignees are not inconsistent or conflicting, nor does the *joint agency* of the assignees give to the bank any control or power to revoke any of the trusts.

5. We confidently assert, that no power to alter the trusts, or that any portion of the property shall be reserved for the use of the

Robins, et al. v. Embry, et al.

bank, exists in this deed. It is said, that the appropriation of \$250,000 of its assets, or rather the power to borrow that much money afterwards, to finish the road, is appropriating that sum to its own use ; and that a power to create a future liability, &c., makes it fraudulent.

This is not so. The bank had a right to assign the property, to pay existing debts, and also to pay future advances to be made to carry out the powers and duties enjoined on it, in the charter. See 4th sec. of charter.

An assignment made to pay existing debts, or future advances, is good. 3 Cranch, 73 ; 2 John. Ch. Rep. 2. The case in 7 Paige, 568, was founded on New York statute, which prohibits this. The bank could legally contract this debt, by its charter, and, if so, it could legally stipulate it should be paid out of the property.

Again : That the bank had the power to convey a part of the property, to borrow money to complete the railroad, cannot be denied. Why could it not, then, authorize the trustees to borrow for it ? If it had power to create the debt, it surely had power to secure it.

Again, the bank or individuals had the power to stipulate that any valuable unfinished property, transferred, should be finished out of the proceeds, and the whole appropriated to pay its debts.

It is said there is no schedule. In partial assignments, when there is not sufficient description of the property, or debts, &c., this has been held to be *prima facie* evidence of fraud (6 Mass. Rep. 339). But in assignments like this, where all is assigned, and when it is impracticable to have it, it is no evidence of fraud whatever. See case of Real Estate Bank of Arkansas, p. 51 ; 1 Binn. 502, 515, 523 ; 17 Ser. and Ra. 251 ; 3 Mass. R. 252 ; 2 Stew. Rep. 86 ; 8 Pick. 65 ; 6 Gill and Johns. 364, 365 ; 4 Wash. 237.

6. It is again urged, that the deed must be absolute and unconditional ; and so says Sup. Ct. La., and that Court refers to 11 Wend. 202, to support its position. This is untrue, to the extent assumed by the Sup. Court of La. The case in Wendell, only decides where conditions are imposed for the sole benefit of grantor, it is fraudulent (*tide the case*) ; but, that conditions may be annexed, is decided by all the cases, as that certain creditors should be preferred, if they file within such time, &c., &c.

Robins, et al. v. Embry, et al.

7. The Supreme Court of Louisiana lay great stress on the fact, that if any of the trustees died, others were to be supplied by them. They consider this a *power* of revocation, and refer to 15 John. Rep. 571; 11 Wend. 202, neither of which cases supports them. The power there was to *remove* the trustees, and *revoke* the trusts. The power to appoint his own trustees is admitted to exist in the debtor. This power in the deed is qualified, by the express provision, that, in its exercise, they are in nowise to annul or revoke the trusts. 4 Mason, 221.

8. The right of the directors to certify certain claims, is also said to render it void. This, so far from being fraudulent, is directly the reverse. In cases where it was doubtful whether anything was due, as the assignees knew nothing of it, of course the directors were the proper persons to examine the matter; but their decision was neither to exclude the debt, or prevent it from being filed. It is expressly provided that the party may sue for it, and if he recovers it is to be considered filed, &c.

9. The time in which the property is locked up is not unconscionable, it is only twelve months; until that time creditors have the right to come in. 11 Wend. 209; 2 Paige, 490; 4 Mason, 225; case of Real Estate Bank of Arkansas, pp. 47, 48, 49.

10. That the power to compromise is valid. *Vide* case of Real Estate Bank of Arkansas, and Story and Kent's opinion thereto annexed; 4 Rawle's Rep. 207. The dictum to the contrary, in 11 Wend., was the opinion of one judge to two, and the court did not decide on it, page 203, 204, 206.

But in that case it was to compound with *creditors*, here it is *debtors*; and the objection was, it gave them the right to prefer, &c. *Vide* page 203. This reason does not apply here.

11. It is objected that it is void, because the uses are not declared. 11 Wend. 202, and 7 Paige, 568, are cited. The uses are declared in this case. No power is reserved to declare any future use; the profits are all applied to the payment of borrowed money, and debts. If this is not declaring uses, I do not know what is.

The decision in La., is based on 15 John. 571, and 11 Wendell. These cases are far from supporting that decision. Nothing is re-

Robins, et al. v. Embry, et al.

served in the assignment ; no benefit is reserved ; the road is to be finished ; but its profits are given to the creditors of the bank.

The Supreme Court of La. say it is a *mere agency* : This is denied. Everything is transferred, that could be transferred ; an agent's power may be revoked. Here the powers of the trustees cannot be. No interest exists in an agent.

Here, all the legal interest passed to the assignees. See case of Real Estate Bank of Arkansas, page 43, 46.

As to the power of the directory to examine accounts, &c., *vide* case of Real Estate Bank of Arkansas, 52.

If the power given to the assignees to take possession of the road, and control it for the purposes of finishing it, and receive its profits, was within the power of the corporation, and it necessarily created the assignees joint agents, it was proper and right. If not within its power, the stipulation is void, for want of power ; but, surely, this is no evidence of fraud. It is good as to all the balance. 4 Pet. Rep. 360 ; 15 John. Rep. 571 ; 2 John. Ch. 2. Otherwise, buildings partially completed, &c., would not be finished, and all parties be injured ; this stipulation was for the use and benefit of the creditors. 2 Conn. Rep. 633 ; 13 Connect. Rep. 382 ; *Convey. Ex parte*, p. 49; 11 Wend. Rep. 240; 7 Maine Rep. 144. But, if no such power existed, it is not a fraud ; it is the reverse, if *bona fide* intended to be appropriated to the creditors.

The power is, however, expressly given in the 4th section of the charter. By it, they have a complete and exclusive power over the property, *to finish and build the road*. Creditors all have notice of this. The charter is declared a public law. They may alien, sell, or dispose of the property in any way to complete the road, and have the right to borrow for such purpose. 5 Wend. Rep. 602

So far from its being fraudulent, it was obliged to be done, to save the creditors. It was done to save the *franchise granted* ; and why ? because the intent in *saving the franchise was to save the creditors*. If the franchise was lost, their debts were lost. If the road was not completed in one year the corporation was dissolved, by the 5th section. The act was declared *null and void*, and all privileges ceased. The consequence of which was, that, without

Robins, et al. v. Embry, et al.

the action of the government, all debts were extinguished (2 Kent's Com. 307).

Again, the contract with the State and public to finish the road, was as obligatory as to pay its debts. It had the right, therefore, to convey property to enable it to comply with its contracts, because, by not doing so, it injured the public and the creditors. This was a contract between the government, for the use of the public and the corporation. The provision in the assignment, to pay "*the necessary expenses* of said President, Directors, &c. of the Commercial Bank of Vicksburg," of course, only means the expenses which the corporation was at in keeping up the road, &c. After its assignment, there could be no *necessary expenses*, save these.

A corporation, after general assignment, although it *exists*, and is a living corporation, yet it is powerless, as to the discharge of the ordinary purposes of its institution. 6 Gill and John. 230.

After the assignment, it could only act in regard to the road, and no expense would be a necessary one, except so far as the road was concerned, and these expenses it had a right to retain. 13 Serg. and Raw. 210.

S. S. Prentiss made an argument on the same side, and furnished the Chancellor a full brief (which, by some accident, was lost before the papers came into the hands of the reporters).

W. Thompson responded to the arguments of Messrs. Yerger and Prentiss, in an oral speech, but did not make any brief.

CHANCELLOR. On the 13th of February, 1840, the Commercial and Railroad Bank of Vicksburg, by two separate deeds of that date, made an assignment in trust, to the complainants, of all its property and effects, of every kind and description, including the net profits of the railroad when it should be finished. The assignment recites that the embarrassments of the corporation were such, at that time, as to render it unable to either complete the railroad according to its charter, or to pay its debts. The objects of the assignment are declared to be:—1. The payment of all its

debts. 2. The completion of the railroad, in order to save its charter. It is also stated, that the accomplishment of this latter object would increase its ability to comply with the former, by applying all the profits of the road to that end. The trustees are required to sell or dispose of the whole property, as in their judgment may be deemed best for the interest of the creditors. The proceeds are to be applied to paying the expenses of executing the trust,—the *necessary* expenses of the President, Directors, and Company, in the management of the corporation, and in payment of debts. The trustees are authorized to borrow in the name of, and upon the credit of, the bank, the sum of two hundred and fifty thousand dollars for the purpose of completing the railroad, and this sum is to be first paid out of the fund assigned. The trustees are authorized to take the possession and control of the railroad, for the purpose of completing it, and of receiving the profits thereof, to be applied to the payment of debts; and they are required to exhibit, periodically, a statement of their accounts to the board of directors. They are authorized to compromise with the debtors of the bank, with a view to the security of the debts, and to the interest of creditors. They are required to give twelve months to the creditors to come in under the deed, and before any dividend is declared. They are forbid to receive any claim against the corporation, unless the directors have first pronounced it just. But a creditor, whose claim is rejected, may then bring suit on it, or by agreement with the assignees, he may have it settled by arbitration, and upon either of these conditions he becomes a party to the assignment. In the management of the railroad, the assignees are declared to be the joint agents of the bank and of the creditors. If a vacancy happens in the number of the assignees, the directors of the bank are to fill it; but if they neglect to do so, the appointment is to be made according to the course of a court of chancery. It is declared that the bank shall have no power to control, modify, or revoke any of the trusts there declared. The assignment of the profits of the railroad are without limit as to time. It is to be inferred, therefore, that it is to continue until all the debts are paid. This I believe is the substance of the two deeds to which I have referred. The defendants, being the creditors of the bank, sued upon their claims,

Robins, et al. v. Embry, et al.

and recovered judgments at law, since the date of the assignment, and had executions issued and levied upon some lots, upon which the depot-buildings are situated, - at the *terminus* of the railroad, at the city of Vicksburg. The complainants filed their bill, setting up the assignment of the property in question to them, and pray for an injunction against the sale thereof, and that they may be permitted to proceed to discharge the trusts with which they are clothed. The case was submitted upon the general demurrer of one of the defendants to the bill. It is insisted that the assignment, under which the complainants claim, is void, as well from the want of power in the bank to make it, as from objections arising upon the face of the assignment itself. Conveyances of this description have but recently come into use in this State, and have not, as yet, so far as I am advised, received a judicial decision in any of our courts; we have no special statute regulating them, nor do they appear to be in any way affected by our insolvent laws. I am left, therefore, to decide this case by such lights as are furnished by the English decisions; and by the adjudications of the courts of our sister States, upon the subject. So far as *private persons* are concerned, I do not find that it has been at any time doubted, that an individual debtor may rightfully convey his property in trust for the benefit of *all* his creditors *equally*, — where he divests himself of all control over it, without reserving any use or benefit to himself, and without imposing any sacrifice on his creditor, as a condition to his participation in the fund. Its integrity and validity cannot be impeached under the statute against fraudulent conveyances, because of its tendency to temporarily delay creditors; nor because of its effect, in placing the property beyond the reach of process at law. I can perceive no reason, founded in either principle or policy, why a corporation may not make an assignment for similar purposes, preserving to each creditor the right of sharing *equally*, according to the amount of his claim. That a bank cannot legally assign its property and effects, to any other purposes than those contemplated by its charter, I readily admit. But it is surely one of the first duties of a corporation to pay its just debts; and that it may assign its property for that purpose, is, I think, a proposition too plain for discussion. It would be strangely incongruous to hold that a bank was bound to

Robins, et al. v. Embry, et al.

pay its debts, but could not apply its property to that end, in a mode sanctioned as to individuals, without transcending the sphere of its power. But authorities are not wanting upon this point. The cases of *The State of Maryland v. The Bank of Maryland*, 6 Gill and Johns. Rep. 205, and the case *Ex parte the Real Estate Bank of Arkansas*, are in support of such an assignment. The assignment in this case is for the double purpose of paying debts and completing the railroad. Authority to sell, transfer, or dispose of its property for the latter object, is expressly conferred upon the bank by the 4th section of its charter. I think, then, that where an assignment is for the benefit of *all* the creditors of the assignor, *equally and ratably*, it must command the sanction of every enlightened tribunal, whether it be made by a corporation or a private person. It is a practical enforcement of the maxim, that "equality is equity." And this it would seem was the criterion by which some of the English cases tested the validity of such assignments. In that form, the equitable principles of a bankrupt law are carried out through the medium of a private contract. In the case of *Pickstock v. Lyster*, 3 Maule and Selwyn, 371, the opinion of the court seems to have turned upon the ground, that the assignment effected an equal distribution of the property of the debtor, among all his creditors. Justice Bayley said, that, "so far from being fraudulent, it was the most honest act the party could do."

The more recent cases, however, both English and American, especially as to private persons, sanctioned a departure from this principle of equal justice, by sustaining assignments, establishing preferences in favor of particular creditors. And the rule, to that extent, may be now considered as finally settled. *Goss v. Neale*, 5 Moore's Rep. 19; *Rex v. Watson*, 3 Price's Rep. 6; *Brewer v. Pitkin*, 11 Pick. Rep. 829; *Phenix v. Ingraham*, 5 John. Rep. 112; *Marbury v. Brooks*, 7 Wheaton's Rep. 565. The right of a bank, in failing circumstances, to create such a preference among its creditors, rests, I think, upon much more questionable grounds. The question, in this form, is very barren of authority; neither my own researches, nor those of the learned counsel, have furnished but two cases directly to the point. The first is, the case of *Catlin v. The Eagle Bank*, 6 Conn. Rep. 233. The second

is, the case *Ex parte The Real Estate Bank of Arkansas*, which simply adopts and follows the rule laid down in the case from Connecticut. The point did not arise in the case in 6 Gill and John. 205, because there the assignment was for the benefit of all the creditors, ratably. It is true, that the court, in declaring the right of the Bank of Maryland to make an assignment, say, that it had authority to do so, "either for the benefit of the preferred creditors, or of all its creditors, equally, as well as an individual," and *Catlin v. The Eagle Bank* is cited. But the case did not present the question, and it cannot, therefore, be regarded as an authority upon the point. If I were free from the authority of adjudged cases, I should be inclined to declare, that the property of a banking corporation must be regarded as a *trust fund*, for the equal benefit of all its creditors; and that no preference could, therefore, be given to any one creditor, or class of creditors; although the case, referred to from Connecticut, treats that position as having nothing in principle, analogy, or authority, to support it. In that case, the Eagle Bank, being in failing circumstances, assigned its effects to one of its creditors, without making any provision for the others. Catlin, being one of the creditors, unprovided for, filed his bill, to set aside the assignment, and to have a ratable distribution of the funds of the bank among all the creditors. The ground upon which the complainants' counsel rested their case was, that the funds of the bank were trust funds, in the hands of the directors, for the benefit, equally, of all creditors, and that no preference could be made among them. Mr. Chief Justice Hosmer considered this view of the case as wholly inadmissible. He admitted that the directors were the trustees of the stockholders, but he regarded them as no more the trustees for the creditors of the bank, than an insolvent debtor is the trustee for his creditors; and, after arguing to show that the two cases were entirely opposite, and parallel in their nature, he adds, "The novelty and unfoundedness of the plaintiffs' claim are such, that it is difficult to support, or even to oppose it, without taking leave of every established principle, and beating the air." He had before said, that no principle, analogy, or adjudged case had been referred to, and he could conceive of none, in support of such a position. It is with great diffidence, that I attempt to support a

doctrine, which is thus regarded as a great legal heresy. I think, however, with much deference, that, without "beating the air," much may be deduced from both principles and adjudged cases, as well as from the closest legal analogies, in support of the position, that the funds of a corporate bank are held by the corporation, as trustee for the benefit of both stockholders *and creditors*. The truth of the position seems to me to result most clearly from the very nature of corporate funds, and from the known duties of the directors in relation thereto. What are the purposes, to which, in legal contemplation, these funds are to be devoted? The ultimate ends are few and simple. The funds are to be operated on, with a view to the interest of those who placed them there; and if, in this process, debts are contracted by the bank, it follows, as a clear legal consequence, that those funds stand *exclusively* pledged for their payment. From what other source is payment to be obtained? The private property of the stockholders is not liable; nor is there, in this respect, any individual responsibility on the part of the directors. It follows, then, that the only source to which they can look, or to which they have a right to look, is the corporate property in the hands of the directors. That fund, then, must be considered as a special fund, set apart by law, in lieu of the private property of the corporators, as *trust fund*, for the payment of the debts of the corporation. Suppose a private person places in the hands of another a portion of his property for the benefit of his creditors, generally, would they not be entitled to share equally in the fund?

Now, when and under what circumstances does property become impressed with a trust character? I answer, whenever it is devoted, by private contract, or by operation of law, to special purposes, to be held for the use of particular persons. It must, thenceforth, be held in trust, to subserve the ends to which it is appointed. If the directors of a bank are to be regarded as holding the bank property, with an absolute right of disposition, they may transfer it to whom they please, with or without notice of its corporate character, freed from all claim on the part of creditors. And this is the doctrine of Mr. Chief Justice Hosmer. What remedy, then, have the creditors? They cannot reach the property in the hands of the purchaser, — they cannot make the stockholders liable; and, surely,

the directors are not responsible for the exercise of a plain legal right. The creditors, then, according to Mr. Chief Justice Hosmer, have no other security, than the *naked faith* of a corporation. Experience has shown us, that this is a doubtful capital,—not always to be trusted. Is this the only security, which the legislature intended to give those who might be luckless enough to take bank bills, under the delusive notion, that the corporate property of the banks was pledged for their redemption? I think not. These bills are usually received upon the faith, and with the knowledge, that there is no other fund, except the corporate property of the bank, provided for their redemption; and it would be a fraud on the public to hold, that this property was not irrevocably committed to that purpose. The remedy for these evils is, to hold that the bank property has an equity attached to it, in favor of creditors, which cannot be defeated by an arbitrary transfer thereof. But to show more clearly that a trust exists, in such cases, for the benefit of creditors, I inquire in what right, and to what use, do the directors or corporation hold such funds? It is clear that they do not hold them in their own right, and for their own use. I am told by Mr. Chief Justice Hosmer, that they hold in trust for the benefit of stockholders. This is true; but there must be some other trust in the case; because, if the stockholders are the exclusive beneficiaries, they would have a right to withdraw, at any time, the whole funds of the bank, without reference to the claims of any one else. But all will admit, this cannot be done; they can only withdraw such portion of the capital stock and profits as may remain, after paying all the debts of the corporation. It thus appears, that, although the directors, or corporation, are trustees for stockholders, they are also trustees for the creditors, who have a prior and paramount equity. Mr. Chief Justice Hosmer held, that it might as well be maintained that the property of every insolvent debtor was a trust fund, for the benefit of his creditors. To my understanding, there is not the remotest analogy, in fact or in law. The creditor of a private person has recourse to his *whole property*. The creditor of a corporation has no recourse, except to the corporate funds; the private property of the corporators cannot be reached. The creditor of an individual debtor has not only a claim upon his pres-

Robins, et al. v. Embry, et al.

ent property, but, when that is exhausted, he has still a claim upon his productive industry, in the shape of future acquisitions of property. The creditor of a bank, when he has exhausted all its corporate property, has no other recourse whatever, whether his debt be all paid or not. A private debtor has the absolute right in his property, and before any lien intervenes in favor of his creditor, *he* may dispose of it, whenever and to whomsoever he pleases. A corporation has but the naked, legal title in the corporate property, which cannot be aliened at pleasure, except it be subject to the trusts implied by law.

This question was examined by Judge Story, in the case of *Wood v. Dummer* (3 Mason's Rep. 311), and after reasoning upon the subject with his usual clearness and ability, he says ; "To me this point appears so plain upon principles of law, as well as common sense, that I cannot be brought into any doubt, that the charters of our banks make the capital stock a trust fund for the payment of all the debts of the corporation. The bill-holders and other creditors, have the first claim upon it ; and the stockholders have no rights, until all the other creditors are satisfied." He then adds. "If the capital stock is a trust fund, then it may be followed into the hands of any person having notice of the trust attaching to it." And he cites *Vase v. Grant*, 15 Mass. Rep. 505, 517, 522 ; and *Spear v. Grant*, 16 Mass. Rep. 9, 15, as cases in support of that view. The case of *Mumma v. The Potomac Company* (8 Peters, Rep. 286) recognizes the same principles. It was there held, that the creditors of a dissolved corporation may enforce their claims against any property which had not passed into the hands of a *bonâ fide* purchaser. Thus clearly holding the corporate property, affected with a trust, for the benefit of creditors ; because, if the trust did not exist during the existence of the corporation, it evidently did not arise out of the mere act of its dissolution. 2 Story's Eq. 499. I think it will thus appear, that Mr. Chief Justice Hosmer had not sufficiently considered the point, when he pronounced that the idea of a *trust* in such cases, had nothing in principle, cases, or analogy, to support it. If then it be true, that the funds of a corporate bank are a trust fund, primarily for the benefit of its creditors, it follows that

Robins, et al. v. Embry, et al.

each and every creditor has an equal claim upon it, and that it is not competent for the corporation to defeat that right of equality, by making an assignment in favor of one class of creditors and to the exclusion of another. It is admitted, that where property is conveyed by a private individual, for the payment of debts generally, no preference can be given to one creditor over another ; that the fund so conveyed constitutes equitable assets, and must be distributed ratably among all the creditors. If a fund becomes pledged by operation of law, for the payment of debts generally, it is difficult to see why the same principle of equality should not be preserved in its distribution, with that which it is admitted must obtain, where the trust is created by the express appointment of the grantor. The ground upon which all the cases place the right of a private debtor, to prefer one of his creditors to another, is *his absolute dominion* over his own property, and his *unrestricted right of alienation*. This reason has no application to a mere corporation. They have neither the absolute right in the property itself, nor, as we have seen, the unrestricted right of alienation ; they hold in the right of others, and to particular uses. The right of alienation, is therefore necessarily restricted to the uses to which the property is legally devoted. If then the reason, which applies in the one case, does not apply to the other, so neither does the law which follows it ; *cessante ratione cessat et lex ipsa*. I think this right of giving preferences so liable to abuse, so capable of being used for fraudulent purposes, and so opposed to the spirit of equal justice, has been already carried as far as the spirit of an enlightened jurisprudence can sanction. The absolute right of property in a private debtor, carries with it an unrestricted right of disposal, which it may be impracticable for the courts to restrain, or modify, without infringing upon the law of private property ; he therefore may be left free to build up one, and put down another of his creditors, without reference to the justice of their claims. But even the existence of the rule, to this extent, has been deplored by many distinguished jurists. Chancellor Kent, while he admits it to be a fixed principle of law, considered that its application should be watched with jealousy, and that it should not be enlarged so as to give "it a new and dangerous facility."

Riggs v. Murray, 2 Johns. Ch. 578.

Robins, et al. v. Embry, et al.

I conceive, that to extend the rule to a banking corporation, would be to enlarge it, and give it that "new and dangerous facility" which the great and learned Chancellor said should be guarded against, with watchful jealousy. Suppose that a bank, in failing circumstances, should select some two or more of its bill-holders, and assign the whole of its assets to them, leaving all the other bill-holders wholly unprovided for. Would not such an act of gross injustice and partiality shock the moral sense of every man in the community? In such a case, there is not even the plausible pretext, which is sometimes assigned, as a reason, for allowing a private debtor to credit such a preference; to wit: that he may select his most meritorious creditors; because, in the case which I have supposed, there could be no conceivable distinction between the merits of the claims of the different bill-holders. And shall we admit that we live under a system of laws, which not only tolerates such rank injustice, but is powerless to prevent it. I ask when and where was the law established? Is it a part of the common law? Is the rule so firmly fixed by a long series of adjudged cases, and by the customs and approval of society, as to render it unsafe and unwise, that it should be overturned? It is indeed the law of the Supreme Court of Connecticut, and Arkansas; but I do not find that it has any other sanction; and, with all my respect for those distinguished tribunals, I must be permitted to doubt its soundness, its morality, and its policy.

The reason which led to the establishment of the rule, has no application to such a case. The corporation is the creature of legislative will; it has no such general powers, or rights of property, as those which belong to a private citizen. Its powers are limited to the ends for which it was instituted.

The cases referred to, which sustain the right of a corporation to create such a preference, say, that there is "nothing in the charters to prohibit it." I answer, that there is nothing in the charter which grants it; and that the courts will not, by construction, imply a power, not necessary to the ends of its institution, which it is admitted may be productive of both fraud and injustice. Public policy, and the principles of equal justice, require that the property of a debtor shall be equally devoted to the payment of

Robins, et al. v. Embry, et al.

his creditors, where the rule can be enforced, without infringing upon the laws of private property. No such infraction is involved in applying the principle to corporations. I then repeat, that I incline to the opinion, that the property of a corporation should be regarded as an equitable fund, so far, at least, as to preserve the principle of equality among its creditors. But I find it unnecessary to express a decided opinion upon this point ; because after full reflection, I am satisfied, that the assignment, in this case, is not liable to the objection of giving a preference, at least, in the odious sense in which it is usually found in such assignments. It is true, that the loan for completing the railroad is to be *first* paid ; but the assignment contemplates a full payment *afterwards*, to all the other creditors, equally with those who might become such, through the medium of the intended loan. This case, therefore, bears no analogy, in principle, to the cases usually found upon the subject ; ordinarily, the fund assigned for distribution, is limited and circumscribed to the amount of property the assignor then has ; and the postponed creditors are left to take such fractional parts of their debts, as they can get out of the fragments that may remain, after paying off preferred creditors. But here an unlimited and continually increasing fund is indefinitely assigned, until, by its annual accumulations, the whole number of creditors may be fully paid. No one creditor is asked to compound his debt, by accepting less than its full amount, as a condition to his participation in the fund. No release is stipulated for, until full payment is made. The accruing profits of the railroad stand pledged from year to year, until all the creditors are satisfied. I pass next to the consideration of the objections, which are alleged to exist on the face of the assignment itself. Prefatory to this, it may be stated, that it is essential to the validity of this species of conveyance, that the assignor shall part, absolutely and irrevocably, with all title to the property ; and all authority and control over it ; free from all conditions and restrictions, that will unnecessarily delay, and embarrass the rights of creditors. There must be no reservation out of the property for his benefit, unless it be the surplus, after all the debts are paid ; nor any authority to control or direct the assignees in the execution of the trust ; and all the uses must be clearly and

Robins, et al. v. Embry, et al.

explicitly declared. Where the assignment is obnoxious to any of these objections, it will be declared void. 1. The first and leading objection urged by counsel, is the provision which authorizes the assignees to borrow two hundred and fifty thousand dollars, on the credit of the bank, for the purpose of completing the railroad. It is insisted that this is virtually a reservation to the use of the corporation, of the amount to be borrowed, because it was to be vested in the railroad, which is still the property of the corporation.

The deed recites, that the bank was in a condition which rendered it necessary and proper, that it should make an assignment for the benefit of its creditors. It also shows that a portion of its assets consisted in the railroad, which was then in an unfinished condition, and which it had not the ability to complete for the want of funds. The bank was bound, in good faith, to make the road, as well as its other assets, tributary to the payment of its debts. If the railroad had been left altogether exempt from any charge, on account of the debts, this might well have subjected it to the charge of fraud; because I infer, that that was in reality the most valuable item in its assets. It is evident, from the history of banking in this State, about that time, and since, that no further profits could be anticipated from the bank itself. The only means, therefore, left it for increasing its ability to pay its debts, was the completion of the railroad, and the appropriation of its subsequent profits to that purpose.

But how was the railroad to be made available in the payment of debts? It was then not more than half completed, and was not, therefore, in a condition to make any profit; if abandoned at that time, it would prove a total loss to the company, of the large amount which had been already expended on it; and have thus diminished, if not totally destroyed, its ability to meet the demands of its creditors. Only about twelve months of the time, within which the road was to be completed, then remained; and, by the express terms of the charter, it was to become null and void, if the road was not finished within that time. If a forfeiture of the charter was suffered, not only the railroad would be lost, but the bank would have been disabled from realizing the other portion of

Robins, et al. v. Embry, et al.

its assets, which were assigned. A large portion of the assets consisted in outstanding debts due the bank ; if the charter had been forfeited, these debts, upon well settled principles of law, would all have been extinguished. The real estate of the bank would have reverted back to the original grantors ; and the personal estate have vested in the government. 2 Kent's Com. 307. Injurious and destructive to all parties concerned as these consequences would have been, yet they would inevitably have followed a forfeiture of the charter ; because there is no provision in the charter, nor in the general laws of the land, guarding against such a result. It would seem then, that, in order to save anything for either the corporation or its creditors, it was indispensable that the railroad should be completed. But how was this to be done ? The bank had not the means. It could only be accomplished by the means resorted to. If an assignment be otherwise free from the imputation of fraud, it is not vitiated, by being made in part to secure anticipated advances ; and especially where those advances are intended to be in aid of the general purposes of the assignment. It is difficult to see upon what ground creditors could object to such a provision, where its tendency would be to increase the fund assigned for their benefit. In the case of the *United States v. Hoe* (3 Cranch, 73), the Court say, "It is not in itself exceptional, that property should be bound for future advances. It may indeed be converted to improper purposes, but it is not positively inadmissible." The same doctrine is recognized in the case of *Hendricks v. Robinson*, 2 John. Ch. Rep. 2S3. It is true, it was held in the case of *Barney v. Hempstead* (7 Paige's Rep. 568), that if an assignment of this character provides for the payment of future advances to the assignor, or to the assignees for his benefit, out of the property assigned, in preference to the then existing creditors, such assignment is void as against such creditors. But the reason upon which that decision is founded, viz., that such provision was for the benefit of the assignor, at the expense and to the prejudice of his existing creditors, has no application to the case before me. I think I have already shown that, in this case, the contemplated advances, so far from prejudicing, or subtracting from the fund assigned, is, in reality, calculated

Robins, et al. v. Embry, et al.

to augment it, and thus redound to the benefit of the creditors themselves. But if this provision is to be regarded as a strict reservation, yet the deed contemplates, and provides for the payment of all the debts of the corporation, before there can be any resulting use in its favor, in regard to the road ; and it is clear, upon principle, that an assignor, in such cases, may rightfully, and honestly reserve to himself, any surplus that may remain, after the payment of all debts ; because the creditors can then have no concern whatever with such surplus ; and such a reservation is nothing more than what would result from the operation of the law itself. *Halcey v. Whitney*, 4 Mason's Rep. 206. In all the cases to which I have been able to refer, where assignments have been held void on account of some reservation therein, it will be found that they turned upon the fact, that the reservation in favor of the debtor was absolute and unconditional, without regard to the question, whether all his debts were paid or not. *Burd v. Fitzsimmons*, 4 Dallas, 76 ; *Austin v. Bell*, 20 John. Rep. 442 ; *Harris v. Sumner*, 2 Pick. Rep. 129 ; *Seaving v. Brinkerhoof*, 5 John. Ch. 329. In all these cases, the vice seems to have consisted in the provisions by which the debtor reserved to himself rights in and authority over the property assigned, which might be so exercised, as to be destructive to the interest of the creditors, for whose benefit the assignments professed to be made. 2. The next objection to the validity of this assignment, is, that it transfers to the assignees the power of managing and controlling the railroad. It is said that the management of the road is an act of corporate power, which can only be exercised by the corporation itself, and cannot be delegated to others. To this it may be replied, that a corporation can only act through the intervention of agents ; the corporation itself is a mere artificial or ideal person, having neither volition nor action. And I apprehend that it may be laid down as a general rule, that a corporation may appoint *any one*, for the doing of any act, the performance of which is not expressly or necessarily limited, by the terms of the charter, to the directors or other officers of the institution. Angell and Ames on Corp. 121, 149. An illustration of this rule is found in the case of *Ridgway v. The Farmers Bank*, 12 Serg. &

Robins, et al. v. Embry, et al.

Rawle, Rep. 265. It was there held, that the directors had power to authorize the president and cashier to borrow money for the use of the bank. Here the corporation could not assign the railroad itself, because that is a mere *franchise*, and is not in its nature assignable ; the profits of the road was the only thing in connection with it, which could be assigned, or which *was* actually assigned. There was, therefore, an obvious propriety in giving to the assignees, temporarily, the control of the road, with a view to its completion, and the receipt and application of its profits to the payment of debts. In the *management of the road*, they were the mere agents of the corporation, and I do not see how the leading objects of the assignment could have been accomplished in any other form. In the case of *Cunningham v. Freeborn* (11 Wend. Rep. 240), the subject of the assignment was an iron foundry, and the assignee was clothed with power to keep the establishment in operation ; and to work up, and sell, the unmanufactured articles then on hand. Justice Nelson, referring to this feature of the case, says : "In all this I can perceive no violation of law, or of honesty and fairness. It was a kind of property not readily convertible into money, and valuable only in the business in which it had been employed ; and we cannot say that provision in the assignment was injudicious, much less illegal." The case of *De Forrest v. Bacon*, 2 Conn. Rep. 633, is an authority to the same point. By the 17th sec. of the bank charter, in the case before me, it is provided that a committee of stockholders shall be the superintendents of the railroad. Even if this provision has any bearing upon the question before me, still it does not appear but what these assignees are such stockholders, and, if so, their appointment would be within the letter of the charter. But suppose the directors had no power to constitute the assignees their agents, with a view to the control of the road, and the receipt of the profits thereof ; can the validity of the act be called in question in this manner ? Is it not a matter wholly between the directors and the stockholders, or between the stockholders and the government, as a question of violation of the charter ? If the stockholders have tacitly ratified it by their acquiescence, and the State has not elected to regard it as a violation of their charter,

Robins, et al. v. Embry, et al.

can the validity of the act be questioned by another person? I think it cannot. And this I understand to have been the opinion of the Supreme Court of the United States, as expressed in 12 Wheaton's Rep. 89, in which the Court adopt the rule as declared in the *Bank of the Northern Liberties v. Cresson*, 12 Serg. & Rawle, 306. I consider it as a mere question, whether the corporation has exceeded its powers, or not, and that cannot be inquired into, either in this form, or at the instance of these defendants. *Silver Lake Bank v. North*, 4 John. Ch. Rep. 370; 3 Rand. Rep. 136.

3. Another objection to this assignment, is, that the directors have reserved the power to appoint new trustees, to fill any vacancy that may occur by death or otherwise; and the case of *Riggs v. Murray*, 2 John. Ch. Rep., is relied on as an authority in support of this objection. It is true, that the reservation by the grantors in the deed, of the power to *remove* and appoint other trustees, was one of the features upon which that assignment was declared fraudulent and void. But the leading view, in that case, was the reservation of power to *revoke, alter, and vary* the trusts which were declared in the deed. The reservation, in that case, was not merely a power to appoint new trustees, when accident or design should create a vacancy; but a power to *remove*, at pleasure, those already appointed; thus retaining a control over the trustees, and holding them in obedience to the will of the grantors: and this was justly considered as equivalent to a power on their part to control and direct the administration of the whole trust-fund. It may be readily admitted, that such a provision is wholly inconsistent with the very nature and purposes of such an assignment: to be effectual, it must divest the grantor of all control or authority over the property assigned; having parted with the title, he must also part with all dominion and control over it. In this case, the power to appoint a new trustee to fill any vacancy that might occur, seems to have been solely and simply intended to keep the trust alive, and in active operation. It is expressly stipulated, that the failure of the board of directors to make such an appointment, shall in nowise affect the trust itself; and that, in such event, the appointment shall be made by the court of chancery. And it is expressly provided, that the directors shall

Robins, et al. v. Embry, et al.

not have the power to alter, change, modify, or revoke the trusts there declared.

4. It is next insisted, that the deed is void, because it locks up the property of the grantor for an unreasonable time, before any payment or distribution can take place. What is a reasonable time, in such cases, must depend upon the nature and circumstances of each particular case. What would be reasonable and proper in one case, might be utterly unreasonable and improper in another. Too limited a period of action under the assignment, may be as strong evidence of fraud, as one which is too extended. The time must always be regulated by the nature and character of the property assigned; and the time necessary to collect and convert it into money. Regard must also be had to the number and distance at which creditors may be placed. For instance, an assignment to a trustee in this State, limiting the time for creditors to file their claims to thirty days, would be clearly fraudulent against creditors residing in London. On the other hand, an assignment extending the time to twelve months, where all the creditors reside in the neighborhood, would be equally fraudulent, unless, from the nature of the property assigned, it could not be put in a shape for distribution at an earlier period. Applying these principles to the case before me, I do not think that the time given is an objection to the validity of the assignment. Much of the property assigned consisted in debts due the bank from persons widely scattered over the country; and much time would necessarily be consumed in arranging, collecting, or securing these liabilities. It is, moreover, evident, that a large portion of the creditors were those who held the checks, certificates of deposit, and bank notes, which had been issued by the corporation, and which may be fairly presumed to have circulated over a wide extent of country. It was, therefore, proper that full time should be given to this class of creditors to come in under the deed.

5. A fifth objection is, that the assignees are clothed with power to compromise with the debtors of the bank. To determine this point, it is necessary to look to the circumstances under which this discretion was delegated; and the restrictions under which it is to be exercised. It must be remembered, that the assignment was made at a period of great pecuniary embarrassment in this State,

Robins, et al. v. Embry, et al.

and that failures and insolvencies were daily occurring. Under this state of things, it was reasonable to suppose that many of the debts due the bank, which were assigned, were of a doubtful character, and if anything could be saved from them by compromise, surely, the creditors of the bank cannot complain ; and, especially, as the deed expressly requires that the compromise shall be made in such manner and upon such conditions, as, in the judgment of the trustees, would be to the interest of the creditors of said bank. The case of *Graver v. Wakiman* (11 Wend. Rep. 187, 202) is supposed to be an authority in support of this objection. I do not so understand it. There, the assignment established preferences among different classes of creditors, and gave the assignee the power of compounding with any one or more of the creditors of the assignor, still having regard to the order of preference established by the deed. This was considered as clothing the assignee with power to make further preferences among the creditors, and thus produce further inequality between them ; because he might pay more to one, and less to another, than they would be really entitled to under the deed, according as he might operate upon the fears of the one or the hopes of the other. This, as I understand it, is clearly the substance of the decision upon that feature of the assignment. But here, the assignees are authorized to compound, not with the *creditors*, but with the debtors ; and then only with a view to the security of the debt, and the interest of the creditors.

6. The next objection is, that the assignees are constituted the joint agents of both the corporation and the creditors. But this joint agency only extends to the management of the railroad ; and I understand it to mean, that, so far as the completion and management of the railroad is concerned, they are to be regarded as the agents of the corporation ; but so far as it relates to the receipt and payment of the profits or tolls of the road, they are to be considered as the agents or trustees of the creditors. The corporation was not dissolved by the act of assignment, and the railroad, being a mere franchise, was not assignable ; nor is it attempted to be assigned ; it still remained where the charter placed it—in the hands of the corporation itself. The corporation might, therefore, so far as the construction and preservation of the road was concerned,

make the assignees accountable to them as their agents. That this is the extent of the agency is perfectly clear; because, so far as the control and administration of the trust-fund is concerned, the corporation is completely excluded from all power and authority whatever, by the very terms of the assignment. The idea of an agency over anything, presupposes a power and authority in the person creating it. But here, there is no such power or authority in the corporation, so far as the leading objects of the assignment are concerned. The trusts are all pointed out and defined, and the trustees are the sole and exclusive agents through whom they are to be executed. I cannot, then, regard this provision as establishing an authority in the corporation over the assignees, in the discharge of those duties which relate to the creditors.

7. The next objection which is urged against the validity of this assignment, grows out of the provision by which the assignees are prohibited from paying any claim except a particular class of debts, unless the same had been previously pronounced valid by the board of directors; or unless its validity was settled by suit, or determined by arbitrators to be chosen by the creditors and the assignees. If the power of determining, finally and conclusively, what claims should be allowed, had been reserved to the board of directors alone, I could have no hesitation in declaring the assignment void. But, subject to the qualifications under which their agency in the matter is placed, I am induced to regard that provision as a mere salutary precaution, to guard against any imposition being practised upon the assignees by means of unjust or fraudulent claims. The trustees could not be presumed to be familiar with the nature of the claims against the bank, and nothing could be more proper than that those claims should be subjected to such scrutiny as would prevent honest creditors from being injured by the allowance of unjust or dishonest claims; and I see nothing objectionable in the mode pointed out for that purpose.

8. The omission to annex a schedule of the property assigned, is also made an objection to the validity of this assignment. The property is described as all the estate of the corporation, whether real, personal, or mixed, and all the stocks, goods, wares, merchandise, bills receivable, bonds, notes, book-accounts, claims, demands,

Robins, et al. v. Embry, et al.

judgments, and choses in action. This, I think, is a sufficient general description of the property, to give precise information of its nature and extent by reference and inquiry. It is perfectly competent for any creditor to call for a more detailed description of the property, whenever it may be desired. In the case of *Cunningham v. Freeborn* (1 Edw. Ch. Rep. 264), it was objected to the validity of the assignment, that there were no schedules annexed, to show the particulars of the property assigned, nor the names of the creditors. But it was held, that such omissions have never of themselves been regarded as sufficient to avoid an assignment. In the case of *Hatch v. Smith* (5 Mass. Rep. 42), the assignment was assailed upon the ground of the want of a particular description of the property conveyed: but the Court said the description was sufficient; because, upon investigation, every particular might be easily known. The same answer applies to the case before me.

9. A ninth objection consists in the covenant, by the assignees, to exhibit, periodically, a statement of their accounts to the board of directors. This is supposed to be incompatible with honesty and fairness in the assignment. To my understanding, nothing could possibly be more harmless or innocent in its effect. How an occasional inspection, by the directors, of the accounts of the assignees, could poison and contaminate the assignment itself, or how it could be construed into a reservation of power over the assignees, at war with the interest of the creditors, I have been unable to perceive. It is to be remembered, that this is an assignment of all the disposable property belonging to the corporation, by which, ultimately, a full payment of all its debts is contemplated. Nothing could be more natural or proper, therefore, than that the corporation should require to be advised, as the execution of the assignment progressed, whether there was a prospect that any surplus would result to their use, after the payment of the debts; and, also, when they might resume the active control of the railroad, which they had temporarily parted with, to the assignees, to be held until, by the aid of its profits, the debts might be extinguished. This is one of the grounds upon which the Supreme Court of Louisiana decided this assignment to be void. I have not before referred to that opinion, although I have already examined all the

Robins, et al. v. Embry, et al.

grounds upon which it seems to have turned. It is the opinion of a civil law court, not very familiar with our system of jurisprudence, by which the validity of the assignment must be determined. It is evident, at all events, that the case was not investigated with the ability and research that usually characterize the decisions of that learned court. All the features of the assignment, which are supposed to be objectionable, are thrown together in close array, and the court, looking to their combined effect upon the instrument, say they are confirmed "in the opinion, that this is not such an assignment of property, for the benefit of creditors, as would be held valid by the laws of Mississippi." It would certainly have been more satisfactory, if the several objections, which are there crowded together, and from which a general conclusion is deduced, had been separately examined, and their precise bearing upon the validity of the assignment more particularly pointed out.

10. The last, and by far the gravest objection, to my mind, is the provision, in the deed, which requires the assignees to pay all the necessary expenses of the president, directors, and company of the bank, in the management of the corporation. If this is to be understood as a reservation for the support of the banking part of the corporation, in contradistinction from the expenses necessary to the preservation of the railroad, it will be difficult, according to adjudged cases, to redeem it from the imputation of being such a reservation, in favor of the assignor, as to give evidence of an intention to hinder and delay creditors, unless that inference is repelled by other features of the case. And if this be its true character, it must be regarded as a destroying vice, tainting and affecting the whole instrument; for, although there is some diversity of authority on this latter point, I consider the better opinion to be, that where such an instrument is void in part, it is void *in toto*. *Mackie v. Cairns*, 5 Cow. Rep. 547; *Hyslop v. Clark*, 14 John. Rep. 465; *Sturtis v. Bell*, 20 John. Rep. 449. What, then, is the true construction of this reservation? The counsel for the complainant insist, it can only mean the expenses necessary to the management and keeping up of the railroad; because, by the assignment, the banking operation ceased, and no expenses could be necessarily incurred in that particular. If this be the true interpretation, that

Robins, et al. v. Embry, et al.

provision is not objectionable, since it would be necessary to keep up and repair the road in order to keep up the fund, from which the creditors are, in part, to be paid ; and it would, therefore, be rather in their favor than at their expense. This construction derives some force from the fact, that it is only the net proceeds of the railroad that are actually assigned to the trustees. It would seem, therefore, that a portion of the gross profits are left to be applied, by the directory, to the necessary expenses of keeping up the road, and this may be what is meant by “*necessary expenses in the management of the corporation*;” but it is by no means clear, that this is the true intention of that clause. But suppose it is to be regarded as a reservation for the benefit of the bank, distinct from the road ; still, I incline to think, that, looking to the whole scope of the assignment, the inference of fraud, deducible from this feature, is fully repelled. In all the cases, in which a reservation, for the benefit of the assignor, has been held to avoid the assignment, it will be found, that the amount of the fund assigned is *limited* and *fixed*, and the reservation made without reference to the sufficiency of the fund to satisfy all the debts. And this doubtless constitutes the great blemish in all such cases ; because, if the creditors are to be fully paid, notwithstanding such a reservation, they cannot complain on that account. It is the *fact*, that such a reservation binds and defrauds them of their *full* and just demands, that renders it void. If, then, the reservation has not that tendency, so neither should it have that effect. *Halcey v. Whitney*, 4 Mason’s Rep. 206. But what is the nature, in this particular, of the assignment before me ? It is not merely an assignment of a limited and definite amount of property ; but, in addition to the property specified, there is an indefinite assignment of the annually-accruing profits of the railroad, to be successively applied to the payment, not of a part, but to the whole, of the debts ; and, from anything that now appears to me, I must presume that the fund assigned is sufficient, or will prove so, to accomplish that purpose. It is not, then, a reservation in favor of the assignor, whether all the debts are paid or not. The reason, therefore, which is usually urged against such reservations, would seem not to apply. I think it is not sufficient, to say that this reservation must

protract the period within which the creditors can be paid, because all assignments of this character tend, necessarily, to some extent, to delay creditors in the assertion of their claims ; but there must be a fraudulent intent manifested to produce such delay.

From this view of the reservation in question, I think it is not, of itself, such evidence of fraud as should induce me to declare the assignment void on its face. If, when the case comes to be examined upon its facts, I should find that the inference of fraud, arising from this feature of the case, is not repelled by other provisions, and it should turn out that it was intended to include a salary to the president, cashier, and other officers, a different opinion may be pronounced.

I have now examined all the objections to this assignment. I have been fully impressed, at every step, with the difficulty and importance of the case. Many of its features are without precedent, and call for a new application of principles. It pointed, to a great extent, along an untrodden path ; and, although I have bestowed upon it the most patient and earnest consideration, I cannot say that I am entirely free from doubt as to the correctness of all the conclusions upon the various points which I have decided ; and I shall hence be gratified to see it transferred to a higher tribunal, where my views may be either sustained, or my errors corrected.

Let the demurrer be overruled.

DECEMBER TERM, 1843.

CLAUDIUS GIBSON'S HEIRS v. STERLING NIBLETT, et al.

G. G. bought slaves of N., which were introduced into this State, and sold in violation of law; and, to secure the purchase-money, executed a deed of trust on land; and afterwards sold the land to C. G., which was again sold under the deed of trust to N., at which sale also C. G. became the purchaser, and executed his notes to N., for the purchase-money, and gave a deed of trust to secure their payment; N. attempted to sell under the deed of trust, and was enjoined by C. G., on the ground that this debt to N. was the assumption by him of the debt of G. G.; held, that the illegality of the consideration of the notes of G. G., did not attach to the notes given by C. G., and that N. was entitled to sell under the deed of trust.

Where notes are given, and a deed of trust executed to secure their payment, it is no ground for enjoining a sale under the deed of trust, that a suit at law is pending, upon the notes, in which their validity is questioned.

THIS case was submitted upon demurrer to the bill.

The bill was filed by the heirs of Claudio Gibson, to enjoin the sale of certain land by the trustee, who is made party. The facts disclosed by the bill and exhibits are:—

That Gibeon Gibson, in 1836, purchased from defendant, Niblett, a "large lot" of slaves, the purchase-money of which was all paid but about the sum of fifteen thousand dollars. That Gibeon Gibson, to secure the payment, gave his note, and with one Nathaniel Wilson, a deed of trust, to W. F. Markham and R. Featherston, on 40 slaves, and a tract of land. That afterwards, in 1838, Gibeon Gibson sold and conveyed the land and slaves to Claudio Gibson, which were conveyed in the deed of trust from Wilson and Gibson to W. F. Markham and R. Featherston, as trustees for Niblett's benefit.

That the complainants verily believed that the slaves were introduced for sale, &c., and that, though Niblett pretended he brought them here for his own use, the pretence made at the time of the introduction (in 1836) was to cover the illegal introduction. That, afterwards, a sale was made by Markham and Featherston, trustees, and at that sale, Claudio Gibson became the purchaser, and gave his own note for the purchase-money, and a deed of trust on the same land to secure the amount. A sale being attempted

Gibson's Heirs v. Niblett, et al.

under this last deed of trust, the present bill was filed to enjoin it. The deed of trust from Gibson and Wilson, is made an exhibit to the bill, which disclosed, that G. Gibson's debt to Niblett was some ten thousand dollars, borrowed money, and a note of about sixteen thousand dollars, made by Wilson, and indorsed by Gibson, after several others. The same deed shows, that there was land sold by Niblett to Gibson. The deed of trust, the execution of which was enjoined, disclosed the amount of Gibson's debt to Niblett, and the nature of the consideration.

A. Barwell, for the demurrer.

Apart from the argument which might very properly be made upon the insufficient averments of this bill, the question presented is one which has heretofore received a very careful and learned investigation by your Honor, in the case of *J. M. Pease v. Ballard, Franklin, & Co., and others*. To that case, the profession ought to be contented to refer, and I am willing to submit the question on the present demurrer, on the sound reason of that decision. I would merely suggest, that the present is a much stronger case than the one referred to. The original note, deed of trust, and debtor, are entirely out of the present question. Gibson and Wilson, are, in relation to this case, and in every point of view, to be reckoned among the things that were. Can C. Gibson defraud Niblett by giving his note secured by deed of trust, instead of money, and then go through his own contract with Gibeon Gibson, and Gibeon Gibson's contract with his partner Wilson, to avail himself of an alleged illegality in the contract between Niblett, and Gibson and Wilson. I ask your Honor's attention to the facts disclosed by the bill and exhibits, and respectfully refer to the case above cited, and the authorities there cited.

George S. Yerger, for complainants.

The bill in this case is demurred to. The bill prays an injunction to a sale of land and slaves under a deed of trust, made to secure notes alleged to have been made and given for slaves, illegally imported into the State for sale. The land and slaves were subsequently sold, and complainants claim under this purchase.

1st. There are two points in this case. The first point cannot be distinguished from the decision of Chancellor Buckner, in the case of *Pease v. Ballard, Franklin, & Co.* This point, therefore, I give up in this Court.

2. But the bill alleges, that suit has been brought on said illegal notes in the Federal Court, that they are there defended on the ground of illegality ; that if the property in the deed of trust is sold now, whilst said suit is pending, no one will buy the property ; that it will inevitably be sacrificed, under the trustees' sale, &c. These facts are all admitted by the demurrer. According to the decision of the court of appeals of Virginia, in *Gilmer's Rep.*, in such a case the court will hold up the injunction until the suit at law is decided.

This case is not only just, but is, in my opinion, sound law. A court of equity ought not, and will not, permit a man to so use a legal advantage, as to sacrifice, under a state of things such as is herein admitted, the rights of another. On this ground alone, in this Court, the injunction ought to be kept up, until the case at law is decided.

By the CHANCELLOR. The complainants file this bill as the heirs of Claudius Gibson, deceased, to enjoin a sale about to be made under a deed of trust, made by said Claudius, in his lifetime, by which the land was conveyed, in trust, to Richard Featherston, for the purpose of securing a debt, due from said Claudius to the defendant, Niblett. They show that the land was first purchased by Claudius Gibson, from Gibeon Gibson. That, before the sale to Claudius, Gibeon had made a deed of trust upon it, to secure a debt due from him to Niblett. The land was sold under this latter deed, and Claudius again became the purchaser, and, to secure the purchase-money, reconveyed the same land, by the deed of trust, which they now seek to set aside, upon the allegation that this latter sale, and deed of trust, were the result of an agreement by which Claudius Gibson was to become responsible to Niblett, for the debt due him from Gibeon Gibson ; and that the debt of Gibeon was based upon an illegal sale of slaves to him by Niblett. It is shown that the notes of Claudius Gibson, which the deed of

Gibeon's Heirs v. Niblett, et al.

trust was given to secure, are in suit in the United States Circuit Court, and are there defended, upon the ground that they were a mere renewal of Gibeon Gibson's notes, which were based upon an illegal consideration. The case was submitted upon a general demurrer to the bill. The leading question raised by this bill was very fully examined by me, in the case of *Pease v. Ballard, Franklin, & Co.*, and I refer to that case for an exposition of my views, as applicable to this. Here the consideration which supports the notes and deed of trust, made by Claudius Gibson, is the land purchased by him, under the deed of trust made by Gibeon Gibson. The alleged illegality of the consideration of the latter cannot affect the consideration of the former. I think this point is too plain for argument. I see nothing in the suggestion of the pendency of a suit upon the notes, which should induce me to stay a sale under the deed of trust, until that suit is decided. The creditor is entitled to pursue, both his remedies on the notes, and upon the deed of trust, until by one or the other he obtains a satisfaction of his claim ; and the satisfaction of the one will necessarily extinguish the other. Let the demurrer be sustained, and the bill dismissed, at the costs of the complainants.

Wright, et al. v. Petrie, et al.

DECEMBER TERM, 1843.

DANIEL W. WRIGHT, et al. v. WILLIAM PETRIE, et al.

To discharge one party to a contract, on the ground of the failure of the other to perform his part, such failure must be clearly established by full, direct, and satisfactory evidence.

P. contracted to build a railroad for the Brandon Bank, at a stipulated price, and receiving money from the bank for that purpose, executed a mortgage, to secure its proper application; P. abandoned the work before its completion, and while the Bank was in advance of money to P.; the Bank, being in embarrassed and failing circumstances, without valid consideration, voluntarily released the mortgage, and discharged P. from the debt; *held*, that the release of the mortgage and the discharge of the debt were fraudulent and void, as to the judgment creditors of the bank.

In forming an estimate of the damages sustained by one party, for the failure of the other to perform a contract between them, the possible profits of the one, or the amount possibly saved to the other, are not proper criteria.

A corporation is trustee for the creditors; and where a transfer of its property is made without valid consideration, they may pursue the property, and force the assignee thereof to account for it.

A court of equity will subject the *chores in action* of a debtor, in the hands of a voluntary assignee, to the payment of the debt of a judgment creditor.

P. being about to construct a railroad for an incorporated company, which was to make advances of money for that purpose, executed a mortgage to the company, to indemnify them against any loss by reason of his failure to comply with his contract; P., at a time when the company were largely in advance to him, beyond the amount expended, abandoned his contract; *held*, that as to the sum so in advance, by the company, the damages sustained by them would be considered as liquidated, and so far the mortgage and damages would be subject in equity to a judgment creditor of the company, seeking to subject them as equitable assets.

Where a judgment creditor has his execution returned "nulla bona," but afterwards levies the same on personal property, in which the defendant in the execution has merely an equitable interest, and pending the levy files his bill in the court of chancery, to subject the equitable interest of the defendant to the payment of his judgment debt; *held*, that the right of the complainant to the equitable relief was established by the return of "nulla bona," and was not disproved by the levy upon property, *not subject to sale under execution*.

In a contract between a company and an individual, wherein the latter agreed to build a railroad for the former, and the former agreed to pay the latter in instalments, as the work progressed; *held*, that the latter would be entitled to recover a ratable portion of the money, for the ratable performance of the work.

Where one party abandons a contract with the consent of the other, which he has undertaken, that consent would bind the other to pay for that portion of the contract actually accomplished.

[It is not considered necessary to the proper understanding of the points involved in this case, to give a close abstract of all

Wright, et al. v. Petrie, et al.

the pleadings and proofs : such an abstract would constitute a volume in itself. Such portions only are presented as bear upon the points at issue, and decided.]

The Real Estate Bank of Columbus, Mississippi, obtained two judgments at law against the Mississippi and Alabama Railroad Company, on the 23d of October, 1839, amounting in the aggregate to about the sum of one hundred and fifty thousand dollars. The executions on these judgments having been returned "nulla bona," were afterwards levied upon divers slaves, as the property of the defendants therein : Wm. Petrie claimed the negroes, and gave a bond to try the right of property in the court at law. The complainants, who were the plaintiffs in the judgment at law, aver in their bill, that Petrie's claims to the negroes are founded in fraud, and that the directors of the Mississippi and Alabama Railroad Company, familiarly known as the "*Brandon Bank*," were parties to the fraud : that Petrie based his claim on certain articles of agreement between the Brandon Bank and himself, by which Petrie agreed to make, complete, and put in operation a railroad from Jackson to Brandon, and to construct and prepare everything for that end ; all the items of which were enumerated in the agreement. The road was to be begun within one month from the 23d of February, 1837, and completed within two years from that date : for which the company agreed to pay Petrie two hundred and four thousand dollars. The first payment of twenty thousand dollars to be made in one month from the commencement of the work, and the rest at intervals of thirty days, as the work might require it ; of which Petrie was to be the judge. One hundred thousand dollars of the sum was to be paid to Petrie at intervals of from six, eight, ten, and twelve months, in sums of twenty thousand dollars each, by him to be invested in negro slaves to work on the road ; which negroes Petrie agreed to mortgage to the company, with all other property in his possession, for the faithful performance of his contract. The agreement further stipulated to pay Petrie two dollars for every cubic yard of rock he might encounter in excavating. The bill then averred, that Petrie had purchased the slaves levied

Wright, et al. v. Petrie, et al.

on, and others, with the money furnished him by the bank ; that, instead of one hundred, he laid out one hundred and fifty-nine thousand dollars in buying them ; that the company not only paid Petrie the sum they stipulated, but more than two hundred and forty thousand dollars besides ; yet, that Petrie had not finished any part of the road, and had not attempted to build many of the structures and works enumerated in the contract. That besides this money, Petrie received a salary of forty-five hundred dollars a year : that in two years he abandoned the road half finished, in a ruinous and worthless condition ; abandoned the contract, took the slaves and other property, and embarked in the cultivation of cotton : that, upon a fair settlement with the company, Petrie owed it a large sum ; that the mortgage had never been executed as agreed upon ; that the contract, however, created a right in equity in the Brandon Bank to a mortgage ; and that this equitable mortgage, so created, had been forfeited : that it embraced other property beside the negroes levied on, which the bill describes : that the officers of the Brandon Bank had permitted Petrie to do as he pleased with the property, and had deserted and abandoned the institution ; and that Petrie was without means when he entered upon the contract with the bank. The bill prayed, that this contract might be set aside, William Petrie compelled to account with the Brandon Bank, and pay, out of the sum due to it, the amount of the judgments, or for other relief.

William Petrie answered the bill : he admitted the contract as set forth in the bill, between himself and the Brandon Bank, but denied that there had been any fraud in the dealings between them. He stated, that prior to his employment by that company, the Jackson and Brandon Railroad and Bridge Company owed him six thousand, and he was to receive thirty-seven thousand five hundred dollars from them, for building a bridge over Pearl river ; both which debt and contract were assumed by the Brandon Bank, when they employed him as their engineer, and entered into the contract to construct the railroad. He admitted the investiture of one hundred and thirty-six thousand dollars in slaves, to be employed in the erection of the road, and which he bought with the money furnished

Wright, et al. v. Petrie, et al.

him by the bank : that he bought the slaves for his own use, with his own money paid him for his work, and that the Brandon Bank had no rights or interest in them beyond their right to a mortgage upon them under the contract, which he had been always ready to give, and had actually executed. He denied the right of the bank to any of the property stated in the bill to be the property of the bank, in his possession ; it had been all purchased with his own money paid him by the bank.

He filed an account with his answer, exhibiting the amount of money he had received from the bank, being two hundred and ninety-eight thousand dollars ; a great deal of which was at a discount, and used at a loss : of this sum, was \$125,000 in their own notes, which he estimates at \$22,800. That on the 21st of December, 1839, a final settlement took place between him and the company : that the company had not complied with its engagements with him, and had thus enhanced the costs of the road. This additional expense he had demanded of the company, which they refused to allow ; but at length a compromise was effected, by which he was discharged from any further connection with the road, his contract rescinded, the mortgages cancelled, and the road, so far as done, received in full satisfaction of his part of the contract ; and the company discharged from any further payment on account of the contract. This settlement was made with some delay and difficulty, in the presence and by advice of counsel employed by the company. The account exhibited by him against the company, and which brought the company in his debt, and which resulted in the compromise, is filed with his answer. It is headed, " An approximate estimate of the enhanced cost of constructing the Jackson and Brandon Railroad, Turnpike, and Bridge, on account of the failure of the company to comply with their engagement."

The items of which were in these words :

" Had funds been furnished in July, 1837, as requested, for the purchase of iron, engine, and cars, the railroad and bridge could have been finished at least one year ago, and the stocks for sawing the lumber could have been conveyed on the railroad by the aid of the engine : also, all the materials for constructing the railroad and bridge could have been conveyed in the same manner, which would

Wright, et al. v. Petrie, et al.

have saved the expense of 85 horses and oxen, which, estimated at 75 cents per day, say 300 days, amounts to	\$19,125·00
" And 12 drivers to attend the same, at \$45 per month, 12 months,	6,480·00
" Also extra time of 3 managers, at \$1500 each,	4,500·00
" Loss by being obliged to anticipate the par funds that were voted me by the directory, which were not furnished at the time specified, thereby obliging me to purchase on a credit, at advanced prices, the necessities for prosecuting the work, say 10 per cent. on \$40,000,	4,000·00
" Loss on \$260,000 Brandon money, depreciated 15 per cent.,	39,000·00
" Had I received the iron, the bridge could have been built 8 months before my contract expired, and I should probably have received in tolls, on the bridge and turnpike road,	5,000·00
" Detriment to myself by detention here, say one year at least, and consequent prevention from entering into any profitable engagement that might have offered, say	7,500·00
	<hr/>
	\$85,605·00"

He denied that he had failed to comply with his contract ; he had always been ready to finish the road, when the company would put it into his power to do so ; that he commenced within the specified time, and continued the work till December, 1839, but that he was continually hindered by the disability of the company to furnish him funds to buy iron ; that the iron bought by the company was attached in New Orleans by their creditors, which, together with their inability to obtain the right of way, retarded his operations. He denied that the road was not half finished, but admitted that but a portion of the wood and none of the iron rails were laid ; that a great deal of the road was unfinished ; that the turn-outs, turning-plate-forms, side-roads, crossings, and water-stations, were not commenced, because they were not needed until the road was completed.

Wright, et al. v. Petrie, et al.

He stated that the company, at the time they settled, were greatly in his debt for damages suffered by him, to discharge which damages, they had released him from his debt to them, and from the mortgage which he had made to them upon slaves he purchased with the one hundred thousand dollars, which mortgage had been cancelled by the agreement and settlement with the company ; that he was not without means when he entered upon the contract with the company, but was worth about twenty thousand dollars, which he had also invested in slaves ; that he mortgaged to his brother, F. H. Petrie, sixty of the slaves, to secure \$29,000, which he owed him ; that when the company released him from the contract, his brother, F. H. Petrie, agreed to finish the road, and he went his brother's surety, upon certain stipulations, upon the performance of which by the company, he feels bound to complete the road, but which it is not deemed necessary to notice here.

W. Petrie died during the progress of the case, but the suit was revived in the names of F. Petrie and W. Petrie, his executors.

The proof taken was voluminous ; only part of it will be noticed.

William H. Shelton testified, that he was a director of the bank during its existence ; that the bank claimed no interest in the negroes bought by Petrie, except through the mortgage, which Petrie had executed, but which had been cancelled and returned to him ; that W. Petrie suspended work on the road for want of funds, which the company had promised, but failed to furnish ; that F. H. Petrie worked the road afterwards, until he was stopped by the owners of the land ; that while Charles Lynch was president of the bank, Petrie had a final settlement with them, when, in consideration of the losses of Petrie by delay, for want of funds, on uncurrent money, by freshets, decay of timber, &c., it was then agreed, if Petrie would build the road, according to contract, the company would release all claims against him, and pay him, out of the receipts of the road, fifteen thousand dollars.

Upon cross-examination, he testified, that Petrie had received, on his drafts and checks, \$294,794.91, besides \$17,266.95, expended in iron, and \$125,000 in notes of the bank, which the bank had authorized him to dispose of in New Orleans, in buying iron, and which he had accounted for at eighteen cents on the dollar;

Wright, et al. v. Petrie, et al.

that much of the work Petrie contracted to do was not yet done ; and that the road was of no value in its then condition ; that before Petrie went to New Orleans to buy iron for the road, to guard him from arrest, the bank gave him a release of liability to it ; but that the subsequent settlement was effected in good faith.

H. K. Moss testified, that he was one of the directors of the bank ; that when Petrie settled with it, the bank owed him upon account ; and the final agreement was, that the bank would release him from his contract and discharge his mortgage, if his brother would complete the road for \$15,000, to which his brother acceded, and the settlement was made.

John F. Blow testified, that the grading was finished on the whole route.

W. G. Bullock testified, that he was clerk of the company ; that they had advanced to Petrie, by the 18th of Nov. 1839, \$451,-556·11, of which the witness believed, about \$40,000 was improperly charged.

The other testimony is not inserted, as it either repeats what has been testified, or is not important to the proper understanding of the opinion of the Chancellor.

The following are the resolutions, passed by the board of directors of the bank, at their meeting on the 21st of December, 1839.

“ *Resolved*, That Wm. Petrie be, and he is, hereby, released from that portion of his contract, for the construction of the railroad, in which he has obligated himself to furnish a locomotive engine for the same, and that seven thousand dollars, the estimated price, be passed to his credit.

“ *Be it further resolved*, That the cashier be required to cancel the mortgage, given by said Petrie to this company, now remaining on record on the books of this bank.

“ Whereas this company are under obligation to furnish Wm. Petrie, contractor of the railroad, a certain amount of par funds, to enable him to complete the road, and this bank being unable to furnish said funds, therefore,

“ *Resolved*, That the said Petrie be, and he is, hereby, requested to prosecute said road to completion, at his own expense, and that he retain the use of it, until the profits arising therefrom shall be

Wright, et al. v. Petrie, et al.

sufficient to pay him such balance as this company may owe him, after the completion of said road."

"The above is a true copy from the minutes. R. G. Crozier, Cashier."

Evans, for the complainant.

(The analysis of the pleadings and testimony, furnished by Mr. Evans in this case, and his comments thereon, are so voluminous as to preclude their publication. The points made by him will be briefly stated.)

He contended that, from Petrie's own answer, it was apparent that the company were largely in advance to him, beyond the whole sum for which he agreed to complete the road, and yet no part of the road was completed.

From a careful comparison of the testimony of Petrie's own witnesses, he contended that it was apparent Petrie had received over and above the amount agreed upon, the sum of \$227,470.86.

He controverted the position, assumed by Petrie, that the company were to assume the contract of the Jackson and Brandon Bridge Company; that no such assumption appeared in the contracts, or had been established by parol proof, and he denied that parol proof could be admitted to vary the written contracts.

He contended that, if every item claimed by Petrie were allowed to him, he would still be upwards of sixty thousand dollars in arrears.

He exhibited, at length, the testimony of the various witnesses, who stated that Petrie abandoned the work for want of funds, and displayed their inconsistency with each other, and with the answer of Petrie.

He contrasted the allegations of Petrie, that he abandoned the work for want of a right of way in the company, with the admissions of Petrie and the proof, that the road was graded the entire route, and that he had finished the whole road, except the laying of the iron rails.

He contended that the settlement with the directory had not discharged Petrie from the contract he was under, or his liabilities to the company, but that they were still subsisting.

Cocke, and *W. Thompson*, on same side.

Wright, et al. v. Petrie, et al.

Robert Hughes, for defendants.

The question, by the admission of the counsel upon the part of the complainant, seems to be narrowed down to, Whether the complainants have shown a forfeiture of the condition of the mortgage, by Petrie, to the Mississippi and Alabama Railroad Company? And whether they can have the benefit of that forfeiture? And if they can, What will be the decree which the Court will pronounce?

The defendants insist, that each of these questions are for them:

1. Was there a forfeiture of the mortgage? The consideration of this question involves the construction and nature of the agreements between the defendant, Petrie, and the Miss. and Ala. Railroad Company and the Jackson and Brandon Railroad and Bridge Company.

The construction of the contract for the building the railroad is very important, in order to ascertain how much money was to be paid, and when, to Mr. Petrie. On the other side it is asserted, that Petrie was not entitled to the whole of the money until the time had arrived at which the road was completed; but that payments were to be made, first, of \$20,000, in thirty days; and then that the \$100,000, agreed to be paid to buy negroes, and the first payment of twenty thousand dollars was to be deducted from the \$204,000, and then the balance of \$84,000 was to be divided by twenty-three, the number of months left, up to the period at which the work was to be completed, which would leave the sum of \$3652.17, to be paid in periods of thirty days; and this is insisted upon, because it is said that Petrie had given no security to perform his contract. Now, on our side, we insist such is not the agreement, because the terms used in the writing are directly and positively the other way. There is no dispute that \$120,000 was to be paid, in the manner pointed out in the agreement, at the end of the first thirty days. In reference to the balance of \$84,000, the contract is, that the payments are to be made in intervals of about thirty days; in sums of about any amount, or in proportion to the amount due, and the number of months the contract had to run to maturity! No such thing; but in substance, as it might be necessary to carry on the work, to buy iron, and to furnish engines, as Petrie might determine; in other words, whenever Mr. Petrie should find

Wright, et al. v. Petrie, et al.

it necessary, to carry on the work, to buy iron, or furnish the engine, so that his requisitions were made at the periods specified, he was entitled to receive the amount which was necessary, within his contract; and because this agreement was made, Petrie, on his part, agrees to give security for the performance of his contract, which is a mortgage upon the negroes bought with the \$100,000, and his other property in possession.

Is it not clear, from the agreement, that the covenants and agreements on the part of the company and Petrie, are independent of each other? If they are, Petrie would be authorized to sue for the money before the completion of the work, or without any amount of performance, or offer to perform.

The rule on the subject of covenants is, that when the payment of the money is to be made, or may be demanded, before the performance of the work, then the covenants are independent; but where both are to be performed on the same day, or where one or both of the parties are to do a certain act, upon performance of the other, then the covenants are dependent; one is not authorized to demand performance by the other, in whole, or in part, without performance on his part, or offer to perform.

In construing agreements, with a view to ascertain whether covenants are dependent or independent, the intention of the parties is to be carried out, and whatever that intention is, whether provident or improvident, it is to govern. They have a right to contract in such manner as they may think proper, and whatever agreement they make, the courts will enforce, unless the agreement is made in fraud.

In the case of *Cunningham v. Morrill*, 10 John. R. 203, the Supreme Court of New York lay down the rule as has been stated, and the case throughout sustains the positions which have been assumed. It is true, in that case, the Court decided that the party could not recover the whole price agreed to be given, without performance on his part, because the agreement was, that he was to receive the money, in proportion to the work actually done, and said, that parties "have a right to mould their agreements so as to suit their mutual convenience and interests, and when the courts can ascertain their meaning, they are so to construe the contract as to give effect to that meaning, provided the purpose be lawful." There

Wright, et al. v. Petrie, et al.

is not one word or letter in this agreement or contract, which leads to the construction, that the money, or any portion of it, was to be retained, until the completion of the work, by way of security for the performance ; but, on the contrary, it was left with the contractor, to determine when he might receive the money, and a mode of security, other than that afforded by the withholding the money, was provided, to wit, a mortgage upon property, upon the well known rule, that the inclusion of one thing is the exclusion of another. The providing one mode of security was to the exclusion of the other, like upon the sale of real estate, if security is given for the purchase-money, this excludes the security provided in equity by a lien on the property sold.

Petrie, then, was entitled to recover the whole amount contracted to be paid him before the completion of the work, in order to enable him to perform his contract. Did he receive this amount ? It is insisted that he did not. The exhibit to his answer shows, that up to the 18th day of November, 1839, which was rather more than nine months after the contract was to be performed on his part, he had received in sums from time time, running through the whole period of the thirty-three months which had elapsed from the making the contract, the sum of about two hundred and ninety-eight thousand dollars : from which sum was to be deducted the sixty-six or seventy thousand dollars, to be paid, and which was agreed to be paid by the railroad company, either on account of the bridge company or for themselves, having taken upon themselves the contract : from which was also to be deducted the losses which were from time to time sustained by Petrie on the Brandon Bank paper ; he being compelled to use it at a loss in his operations, and the company, as is proved by the witnesses, having failed to pay him as agreed. Their agreement was to pay money ; and he was compelled, because he could do no better, to take Brandon money. In other words, when he had the agreement of the company to pay, because they could not pay, he was compelled to take their other agreements in lieu thereof, in the form of bank notes, to pay on demand ; and, because it was known that these notes would not be paid on demand, a loss on their use was sustained ; and this loss he was entitled to have made up to him, and it was agreed to be made up. This was

nothing more than equitable. Taking these deductions, the whole amount to be paid within two years was not paid, or even up to the time of the settlement, on the 21st December, 1839. Thus far, and up to this time, the company had not performed their agreement. How, then, was it, on the part of Petrie? Did he perform his part of the agreement? Was he in default? The proof is, that he commenced work immediately after the making the agreement, and continued to prosecute the undertaking until he was arrested in his progress by the owners of the land over which the road passed, who had not relinquished the right of way; and, during the progress of the work, he was hindered and delayed from time to time, by the company failing to furnish him with par funds, with which to buy iron, engines, &c.

But the \$125,000 in Brandon money, paid to Petrie, is a great bogbear, and he is charged with it; and by this item the enormous amount is made out, with which he is charged on the other side. Under what circumstances did Petrie receive this amount? The iron had been ordered; had been shipped from Liverpool; had arrived in New Orleans, and had been attached by the creditors of the company in New Orleans. The road could not be completed without it, but with it, in two months could be finished. Under these circumstances, on the 18th day of November, 1839, the company sent Mr. Petrie to New Orleans, to endeavor to release the iron, and gave him the \$125,000 of Brandon money, and directed him to use it at what discount he could. He accounted for it at eighteen cents in the dollar; but has never been enabled to use it at that price: and a part at ten cents in the dollar; and yet has on hand of it, the sum of \$90,000; so that there is nothing to be made out of this, to show that Mr. Petrie is in default. Is it not also proven, that Mr. Petrie was compelled to stop work, in consequence of a want of way by Washington, Gardner, and Hathorn? It is. As to Gardner and Hathorn, the proof is conclusive. But it is insisted on the other side, that the deposition of Washington proves only an objection on his part, in December, 1839, after Petrie had ceased to work on the road. That objection, however, shows there had been no relinquishment of the way, and from the beginning, Mr. Petrie had been a trespasser. Mr. Petrie made no

Wright, et al. v. Petrie, et al.

contract, that he would prosecute the work at all hazards, whether the right of way was relinquished or not. He was not bound to subject himself to the liability to be sued for a trespass, or when sued for a trespass committed, to other actions for a continuance of such trespass ; and there being difficulties on the subject, as is proved by the testimony of the witnesses, and by the record in the suit, *Gardner v. Petrie, et als.*, filed in the paper, he was bound to desist, and did suspend operations; in consequence of such difficulty, which is not to be attributed to him as a fault, but the fault is on the other side.

Mr. Petrie having suspended operations, insisted that he had been injured by the company ; a meeting of the directory was had on the 21st day of December, 1839, before whom he (Mr. Petrie) appeared, made a representation to them, of the damages which he had sustained, by default of the company, and asked compensation. The company would not agree to all the estimates made, and refused to allow them. Mr. Petrie left them, — was afterwards sent for, by the company, when it was proposed by the company, that they would release and discharge him from the contract, give up any balance which might appear to be due from him, and release the mortgage given by him, provided his brother, F. H. Petrie, would agree to complete the road for \$15,000, and he (Petrie) would be the security of his brother, for the performance. To this, after some hesitation, he agreed, and it was done accordingly. In reference to this agreement, that it was made in good faith, without fraud, or thought of fraud on either side, is manifest from the testimony in the cause.

After this review of the agreement, its construction, and the manner in which it was performed, how it is possible to be said, that Petrie forfeited the agreement, we cannot conceive. It is most manifest, even if there was any doubt whether Petrie was, or was not, in default, that he, in good faith, thought he was not. But that the other side was, and so to some extent, thought the directory, and about that there was a difficulty, and this difficulty settled by compromise, and the agreement and everything under it was discharged.

[An order to take the testimony of Messrs. Shelton, et al.,

Wright, et al. v. Petrie, et al.

was made by the Court, as will be seen by looking at the records.]

But suppose the complainants have made out that Petrie has forfeited his contract, and by consequence the condition of his mortgage given by him to the company, conditioned to secure performance of the contract. The question which then arises, is, whether the complainants are entitled to the benefit of the forfeiture, produced by that non-performance.

1. The complainants are not entitled to the relief asked; because they have come into this Court without having exhausted their remedy at law. The rule on the subject of the kind of relief, asked for by this bill, is, that the party has no title to the relief he asks, until he ascertained, by an execution returned *nulla bona*, that the remedy is exhausted at law. No state of facts will excuse such a return. See 9 Wendell, 548, *M'Elwain v. Willis*. See also 3 J. J. Marsh. 63; 1 Dana, 516; 2 idem. 98; *Binkerkoff v. Brown*, 2 John. Ch. R. 671.

The bill does not allege that a *fieri facias* had been returned *nulla bona*, nor do the complainants that the fact is that no goods and chattels can be found. It is sought to avoid the force of this objection,

1. By insisting that the defendants having answered, without objection, that it is too late to make the objection. The case of *Edwards v. Bohannon*, 2 Dana, 98, above referred to, was a bill in which the complainant endeavored to reach an equity; and he failed to make the allegation of, execution returned *nulla bona*; answer without objection, on that account. Yet the Court said the averment must be in the bill, as it was a part of the complainant's title.

2. The complainants say, true, we have not made a direct averment of a return of *nulla bona*, yet we have referred to an exhibit; and, by reference to that, it will be seen, that there was a return of *nulla bona*, before filing the bill. It is answered, that the mode of making the exhibit is this, the judgment is marked D, and the executions *hereinafter mentioned* are marked E, and none other are *hereinafter mentioned*, except the executions levied on the property in dispute; and the execution, upon which the return

Wright, et al. v. Petrie, et al.

is said to have been made, is nowhere mentioned. Again, the object of a return of *nulla bona*, is to show that the remedy is exhausted at law. If the execution insisted upon as an exhibit is so considered; then all other executions, with the record, will be so considered, and then it will appear, by a subsequent execution, that the right of the company on the strips of land, from Jackson to Brandon, one hundred feet each side of the road, was levied on, together with the road, and the road sold, but not the land, and for everything which appears in the record the same is yet unsold, and may satisfy the execution, in whole or in part. It is not, and was not true, therefore, that the remedy at law had been exhausted. Again, we say the complainants are not entitled to the relief asked, because, by their own showing, they have had an execution at law, levied on the negroes in contest; that a bond has been given by defendant Petrie, to try his right, and for that purpose, an issue has been made up, and is now depending in the circuit court for the county of Rankin. The complainant, in making that levy, went upon the ground, that the property was in the Mississippi and Alabama Railroad Company, and they now insist it is in the company, because a mortgage was given to the company, conditional for the completion of the work, and the condition being forfeited, the estate is absolute in the mortgagee, and therefore the property was subject to execution against the company. This would be the law, if such were the facts, and they are admitted to be so for the present, for argument. Upon what ground, then, is it, that the complainant has come into this Court? If it was for discovery in aid of the proceedings at law, the discovery is or is not obtained. The answers have been filed, and there is an end of the suit. If it is for discovery and relief, the answer is, that he has no right to press his execution at law, and come into this Court also. The proceeding under the execution, by which the issue at law was made up, must be to the exclusion of other proceedings at law, in chancery, or elsewhere. Because the whole proceeding contemplates a settlement of the rights of the parties in that mode. See Revised Code, 201, sec. 25, 26; Laws Miss. Ed. 1838, 341, 342, 343, &c., Nov. 1830, ch. 78.

The act of 1830, sec. 3, in the last clause of the section, settles

Wright, et al. v. Petrie, et al.

this matter beyond a doubt : “ and the final judgment given on any such issue, shall have the like effect on the rights of the parties to said issue, as such judgment would receive if the same had been given in an action of detinue.” That effect is final and conclusive; and in order that there might be no conflict or difficulty upon the execution, all proceedings, as to so much as the value of the property levied on, are to be suspended until the issue is tried. The execution is then in operation as to the value of the property levied on, as to other property — operates on that *only*, until the trial of the issue ; and, as to that, cannot be returned *nulla bona* ; and the property must be protected in the hands of the person giving the bond, because it is in the custody of the law. See *Hagan v. Lucas*, 10 Peters, 400.

But this matter must be placed upon the same footing it would be were an execution taken against the body of a defendant, against whom a judgment was rendered, and by virtue of that execution the defendant was arrested and in custody. While the defendant is so in custody, the creditor would not be permitted to file a bill to reach the equitable estate of the defendant. See *Smith v. Smith*, 1 Paige, 391.

The reasoning that applies to the one, applies to the other ; it is, that the remedy at law is not exhausted. The body in the one instance, and the property in the other, being taken, there is no title to come into equity until the levy on execution of the body is disposed of, and the Court can ascertain whether anything and how much can be made at law.

Again, if the railroad company have a right of action against Petrie, what is the nature of that action ? It is a right to recover damages which are unliquidated, for the breach of a contract, upon which the company would be authorized to bring an action of covenant. The amount of the recovery would depend upon the state of the facts proved ; and various circumstances might exist to increase or lessen the amount. There is no right to any certain or definite sum ; but the amount would rest in the discretion of a jury. Can there be any case found in the books, where, in such case, the creditor has been substituted to the right of the debtor ? None can

Wright, et al. v. Petrie, et al.

be found : no cases can be found, except where an account taken by a commissioner would ascertain the amount due.

Again, we insist the complainants have shown no right, because, before they filed their bill, or before any act was done showing their intention to come into this Court, the right which it is said the Mississippi and Alabama Railroad Company had, by reason of the supposed forfeiture, was released and discharged.

If such was the fact, there is an end of this suit : for it has been repeatedly held, in the courts of the first respectability in the United States, that the right only vests from the date of the filing the bill, or issuance or service of subpoena, or from the time that some act has been done known to the parties on the other side, evidencing an intention to come into equity. See *Hadden v. Spader*, 20 John. 554 - 556 ; 5 John. Ch. R. 280 ; *McDermott v. Strong*, 4 John. Ch. R. 687 ; *Edmeston v. Legae*, 1 Paige, 637 ; *Beck v. Burdett*, 1 Paige, 305 ; *Weed v. Pierce*, 9 Cowen, 722.

But, to relieve themselves from this difficulty, the complainants' counsel insist, that the settlement and discharge of the assignment were made in fraud of the creditors, and therefore void. The proof is, that there was no fraud in any manner intended, but a difficulty and dispute existed ; one party making a large claim for damages, and the other insisting he was not entitled to the extent he claimed : and, to settle this difficulty, it was agreed that a compromise take place ; and Petrie was released and discharged from the contract, and the difficulty thereby settled. And now, although it is admitted no fraud, in fact, was committed or intended, yet, the facts and circumstances prove fraud in law ! If the counsel on the other side can make fraud in fact or in law, out of the circumstances, I freely admit his acuteness.

Again, it is insisted on the other side, that the release and discharge of Petrie from his agreement, was not made by writing, or under the corporate seal of the company ; and therefore is as if it was not done, and the contract is still subsisting, and in full force. The conclusion by no means follows from the premises, because,

The directory acted upon the release and discharge as effectual, by permitting F. H. Petrie to act under the new contract with him ; and it certainly cannot be true, that a contract can subsist and be im-

Wright, et al. v. Petrie, et al.

force, binding both upon the defendant in this case and upon F. H. Petrie. But the premises are not true from which the conclusion is drawn. It is admitted that the old common-law rule was, that a corporation aggregate could not act, in making a contract, but by its seal — such, however, is not the modern rule. A corporation may act by its officers and agents, in writing or by parol ; and by those agents may make any contract or agreement, and release and discharge any such agreement, as individuals might do. 2 Kent, Com. Am. Law, 232, 233, 234, 235. The contract under consideration was made with an agent of the company, to wit, William H. Shelton, the president ; and all matters in reference to it were settled and arranged with the agents, the president and directors, at a meeting of the board. They were the persons to represent the company, and the acts done by them were as binding upon the company, as such acts would have been upon individuals. What would have been the effect of the transaction between the directory and Petrie, on the 21st December, 1839, on individuals ? It would be considered, if to go no further, as a waiver of the agreement. See *Bottsford v. Burr*, 2 Johns. Ch. R. 160.

It will hardly be contended, that it was not competent for the president and directors (who were the persons established by law to act for the company, and they being the only persons and the only means through whom the corporation could act), for a consideration, such as a compromise of difficulties, to give up, by parol, a debt or demand which they had against Petrie. What took place was, therefore, if nothing more, a waiver of the contract, and a release to Petrie, of the amount which was claimed against him as overpaid on that contract.

From all of which we come to the conclusion, that the complainants are not entitled to the benefit of the forfeiture claimed. But suppose all the considerations already urged do not operate, what decree will the court render ? No account can be taken, because the claim of the company on Petrie is not a matter of account,— but a claim for unliquidated damages, arising upon an agreement not performed ; and the mortgage wished to be set up, being conditioned for the performance of the contract, can any precedent be shown of an award of an issue in such case of *quantum dominicatus* ?

Wright, et al. v. Petrie, et al.

Should the Chancellor come to the conclusion, that the views taken in the foregoing argument are not correct, then we insist that no decree can be rendered against Petrie, having an effect different from one which would be rendered against him, in favor of the bank. The suit was commenced in December, 1840; by the act of 1839, Petrie had a right to pay anything which he owed the bank in their paper, which he is ready to do, if he owes anything; and the object of this bill is, to place the complainants in the situation in which the bank was, and confer on them the rights which the bank had. If the Chancellor decides that the complainants have a right to be substituted to the rights of the bank, we are willing to pay them what we were bound to pay the bank, and no more. See *Union Bank of Tennessee v. Bank of Maryland*, 7 Gill and Johnston, 305.

W. Yerger, for defendants, on the same side.

1. The directors of the company had the right to make a contract with Petrie to build the road. See 11th section of charter, act of 1836, p. 157.

A written agreement, whether under seal or not, though it cannot be added to or raised by parol, may be dispensed with or discharged by a subsequent parol agreement. 9 Pick. R. 298; 3 Johns. 528; 13 Wendell, 71. It has never been doubted that a written agreement may be dispensed with by verbal contract. Chit. on Con. 88.

A corporation may bind itself by a parol or verbal contract, in the same manner and to the same extent that an individual may, and an agreement made by vote of a majority of its directors is valid, whether recorded or not on the books of the company, or reduced to writing or not. Angell and Ames on Corporations, 121, 122; ib. 165; *Fletcher v. U. S. Bank*, 8 Wheat. 357; Angell and Ames on Cor. 117, 127; 2 Kent's Com. 233; 12 Wheat. 68.

Corporations, like individuals, are bound by the acts of their agents, when done within the scope of their authority; and the acts of the directors of the company, appointed to manage its concerns, are obligatory upon the company, when made in good faith and within the power conferred upon them. Angell and Ames on Cor. 170, 171.

Wright, et al. v. Petrie, et al.

When a corporation aggregate is created, and the management and control of its business is in the hands of the directors, the latter become the agents and trustees of the corporators ; and a relation is created between the stockholders and those directors, who, as trustees, become accountable for dereliction of duty and violation of trust. 1 Edwards R. 84 ; 1 Edwards R. 573.

Directors are not accountable for anything more than a diligent attention to its concerns, and a faithful discharge of their duty, and are not liable, personally, for errors of judgment, nor unless there has been negligence and fraud. 1 Edwards R. 513.

It is true, that the capital stock is a trust fund for the payment of debts, and that the stockholders cannot discharge themselves from it, while there are notes outstanding and unpaid ; but the conclusion does not follow, that because the creditors of the company may look to the stockholders for payment, to the amount of their stock, that they have a right to set aside contracts and settlements made with the agents or directors of the company, upon the ground of extravagance, recklessness, or want of prudence. In this particular corporations are like individuals. If the agents of an individual make an extravagant or reckless bargain, if within the scope of his authority, the principal is bound by it, unless made in fraud, or the price be so grossly inadequate as to be evidence of fraud. But in no instance can the creditor of the principal rescind the contract, unless made with an intention, on the part of the principal or his agent, to defraud the creditor. 6 Call, 308 ; 6 Johns. Ch. R. 111 ; 3 Cowen, 445 ; 2 Leigh, 149 ; 3 Mason, 308.

A failing debtor has a right to prefer one creditor over another ; and though dishonest in the debtor, it is not in the creditor. 1 M'Cord, Ch. R. 100 ; 7 Peters, 608 ; 1 Eq. Dig. 371.

The mortgage, if forfeited, could only be foreclosed for the damages that the company have sustained by the failure to complete the road, and these are as entirely unliquidated as the damages which a party sustains in an assault and battery. I do suppose that the idea, of filing a bill to foreclose a mortgage for unliquidated damages, never entered into the mind of any person before this bill was filed. But that a creditor of the injured party may file the bill, is carrying the principle to a still more ridiculous extent.

Wright, et al. v. Petrie, et al.

It is a rule in equity, that time is not of the essence of contracts. In this case, as Petrie has performed, faithfully, a large part of the work agreed upon, and as he would certainly have performed the balance, if the right of way had been furnished, this Court would not decree a foreclosure and sale, but might, on a bill properly found, decree a specific performance on the part of Petrie.

George Adams, on the same side.

If Petrie broke the contract or condition of the mortgage, between him and the Mississippi and Alabama Railroad Company, that breach was stopped, and all right to damages waived and extinguished, by the subsequent and final settlement between the contracting parties, and the acknowledgment of indebtedness to Petrie upon that settlement ; the delivery of the mortgage to Petrie, and the contract between the company and Frederick Petrie for the completion of the railroad.

If the railroad company failed to comply with the contract on their part, as the testimony shows they did, they could not, nor can any one in their right, enforce a specific performance of the contract on Petrie's part, or foreclose the mortgage for a breach of any of its conditions by Petrie, or recover damages for any failure on his part.

If there was no waiver of the breach or release of the mortgage, by the railroad company, the mortgagees could claim *damages only* for the breach ; and upon a bill brought by the mortgagees to foreclose, the Chancellor would do no more than order an issue of *quantum damnificatus*.

It is a rule of the courts, both of law and of equity, that fraud is not to be presumed, but that it must be established by proofs ; there is no proof of fraud in this or any transaction between Petrie and the railroad company, but, on the contrary, the testimony in the cause clearly proves a full, fair, and final settlement between Petrie and the railroad company ; the delivery of his mortgage to Petrie, which remained in his possession and was filed by him with his answer, and the testimony, also proves, that the railroad company discharged William Petrie from his contract for completing the railroad, and made a contract with Frederick Petrie, to finish the rail-

Wright, et al. v. Petrie, et al.

road ; all these facts are stated upon oath, by men who are known to the Chancellor, and whose testimony, if *human* evidence can establish anything, must satisfy the mind of the Chancellor, that the property in controversy is not subject to the claim of the complainants ; but the complainants, from the hopelessness of their chance of obtaining anything from the railroad company, and relying, no doubt, upon the general odium and suspicions against the managers of the affairs of that company, have made this desperate and forlorn attempt to subject Petrie's property to their claim ; had the case been one between A. and B., so desperate an attempt would never have been made, nor would it have presented a difficulty or doubt, to any legal mind.

I will not undertake to name the witnesses, whose testimony I rely upon, or detail the facts stated by them, but will barely refer to their known character and intelligence, and the amount of their testimony ; nor will I enlarge upon, or attempt to illustrate, the legal positions I have taken : they have been selected from many others, that arise in the case, as points on which I wish to place the Chancellor's mind, and from which he will readily and clearly perceive every reason in support of them within the legal horizon.

I have not stated the point, or referred to authorities, to show that the satisfaction, release, or discharge of a mortgage, may be proved by parol evidence ; that point is taken, and authorities referred to, by other counsel, on the same side with myself, and so say the best modern authorities.

George S. Yerger, on the same side.

Quinton and McMurrin, for complainants, in reply.

The bill is framed with a double aspect.

1. To remove the obstructions of apparent legal titles, and establish a resulting trust in favor of a judgment creditor.

2. To enforce a specific equitable mortgage, and thus subject more equitable assets to the claim of a judgment creditor.

The defendants have presented labored arguments, to show that the bill itself is defective for these purposes, and that no relief can be granted thereon ; but while these objections are urged in argument, the pleadings, carefully made up, evince, that the able counsel

Wright, et al. v. Petrie, et al.

were not willing to rest their cause on them. They have *answered fully*. Why did they not demur?

The answer of Petrie is not only full, but it expressly invites the full investigation of this Court. It contains the strongest possible agreement, to make this Court the arbiter of the merits of this controversy.

We are aware of the decisions of this Court upon the subject of its jurisdiction on creditors' bills, to which an answer is put in; yet, we respectfully suggest, that this does not come within any of the objections laid down by this Court, to granting relief in cases where no return of *nulla bona* appears. Here, there is an admission of entire insolvency, an agreement to submit the merits. The subject-matters being the declaration of a resulting trust, and the foreclosure of an equitable mortgage are properly of the jurisdiction of a court of equity. The objection then in argument, is merely technical, and comes too late, after full answer.

In the present case, the objection is the more remarkable, because the principal defendant, Petrie, has really brought us into this Court. He first filed his bill to restrain us from levying on and selling the property claimed by him, under our execution. Wright and others complainants, plaintiffs at law, then filed their bill as aforesaid, and also answered Petrie's first bill, praying, that the bill secondly filed, might stand; might be taken as part of their answer, and stand as a cross-bill. The causes were then consolidated, and are now submitted together. (See the agreement between counsel, on file among the papers.)

This case is further distinguished from the cases above alluded to, decided by Chancellor Buckner, in an important and essential feature. The bill seeks only to subject property which has *been levied on, by the execution at law*, and about which an issue to try the right of property had been made up. The creditor, under his judgment, levied on the property, as that of the bank. The claimant Petrie, came in and interpleaded. On this intervention, finding that he may have a bare legal title, and that the interposition of chancery is necessary to settle title, we have sought it in relation to the right of the property levied on. In the case of *Perry v. Nixon*, 1 Hill's Ch. 335, it is laid down, that a creditor,

Wright, et al. v. Petrie, et al.

who has obtained judgment, and sued out execution, and levied it on property, of which the debtor has the equitable but not the legal estate, is entitled to the aid of a court of equity, to make the property available in payment of his demand. See also *Harrison v. Battle*, Dev. Eq. 537; 1 Paige, 305; 4 J. Ch. 687; 10 Yerg. 317.

We have taken these views of the case, because the point has been pressed with such zeal by the opposite counsel; we, however, believe them entirely unnecessary. The bill exhibits the judgments and executions, and avers the total insolvency of the defendants at law. Those records are parts of the bill. They are also proper proofs under the bill and charge of insolvency, and in this state of the pleadings.

These records show, that executions upon both judgments have been returned *nulla bona*. We present an analysis of them, in statement A, annexed to this argument. It is true, that a technical exception is made; that there still appears to remain levied on, and undisposed of, a strip of land on both sides of the railway. This is truly a mere technical shadow, and readily answered. The road or railway could not properly be levied on at law, or sold. If, however, anything passed by the sale of the road, it carried with it, and also disposed of, the strip of land on both sides, necessary for its enjoyment. It is, indeed, the land on which the railway is laid; by reference to the charter of the Brandon Bank, this strip of land on both sides is appurtenant to the railroad, and entirely dependent upon its continuance. It would revert to the original proprietors, upon the expiration of the charter, by non-user. The charter has expired, being repealed by consent of the company. The fair intent of the sheriff's return, is, however, that the railway sold, included the strip said to be levied on. The Chancellor, in the absence of any point made thereon in the pleadings or proofs, will so construe it, if necessary.

But it is urged in argument, that the same exhibits which show a return of *nulla bona*, also show that subsequently other property was levied on, and that we cannot come into chancery, until that also is exhausted. This objection comes irregularly from one, who by his original bill, his oath on his claim of property, and his an-

Wright, et al. v. Petrie, et al.

swer, in the latter case, sets up a claim, both legal and equitable, to all the property which appears to have been levied on, and is now undisposed of. The saw-mill tract, and the slaves levied on, are all absolutely claimed by Petrie, and the object of these proceedings is to submit the equitable and legal claims of both parties to the Chancellor.

If the rule be so stern and unyielding, that a return of *nulla bona* must be shown, even where total insolvency of the debtor is alleged and admitted, that it cannot be resisted, it should, like every other rule not founded in reason, be regarded as merely technical, and a technical compliance be deemed sufficient.

In this case, the bill, answer, and proofs, all show utter and hopeless insolvency. It has become a part of the history of the country; a dark page upon its leaves. It is recorded upon the statute book, by the act repealing and annulling the charter of the Mississippi and Alabama Railroad Company.

Complainants, therefore, are now properly before the Court as judgment creditors, seeking to subject the equitable assets of their debtor, an insolvent and defunct corporation, to their just demand. 20 John. R. 554; 2 Paige, 567; 2 Stew. 378. And if it be found that the bank had any rights against Petrie, not legally or equitably parted with at the time of the judgment, we are entitled to subject them to our claim.

Before we leave the points made, on the structure of the bill, and the right of relief, we will refer the Chancellor to the several prayers of the bill, in answer to objections made on that score. It is true, that the specific prayer for foreclosure of the mortgage is contained in the body of the bill, but we believe it is considered by the most technical pleaders that the prayer may be inserted on any page of the bill.

We have before stated, that the bill has an alternate object, either to declare a resulting trust, or to foreclose a mortgage. A resulting trust in the personal property, may arise either from the purchase of the slaves with the money of the company, and a breach of the condition of the purchase, or from a forfeiture of the mortgage.

At law it is said, upon a forfeiture of a mortgage, personal estate

Wright, et al. v. Petrie, et al.

mortgaged becomes absolute in the mortgagee. The same rule should apply in equity; where an equitable mortgage exists on personal estate, a resulting trust vests in the mortgagee on forfeiture.

It will not be denied, that the contract here, was intended and will be held to have been an equitable mortgage, on the property of Petrie, and especially on the slaves purchased with the advance. The condition was a faithful compliance with the contract. For this the mortgage was to be given. Upon a breach of that contract, the forfeiture took place, and thereupon a resulting trust arose, to which we are subrogated.

In either aspect of the bill, whether a resulting trust arise, or whether we look to the foreclosure of the mortgage, the non-performance of the contract by Petrie, or a breach of the condition, is an essential fact. The mortgage was to be given as a security for the performance of every duty that might arise out of the contract, expressly or constructively, and consequently if Petrie has committed any breach of the contract, by which the bank was injured, or has received advances which he has not returned or duly appropriated; if, indeed, upon settlement, the balance was against Petrie, the breach of the condition of the contract is consummated.

To determine whether Petrie has performed his part of the contract, we must examine it. What was the leading object of the agreement? Certainly, it requires no argument to show that it was entered into for the purpose of insuring the completion of the railway in two years from the date of the contract.

The charter of the company required this to be done; and its corporate powers were hazarded on the faithful compliance, on the part of Petrie, with the terms of his contract. The sum to be paid was designated with sufficient certainty, and the time of payments fixed. No security, whatever, was demanded but the mortgage.

More than three years had elapsed since the execution of the agreement, and before the filing of this bill, and yet the work is not done. So far from being completed it is abandoned, and what has been done gone to decay. Neither the company, nor the

Wright, et al. v. Petrie, et al.

public, have ever derived any advantage from the work, notwithstanding the heavy advances made. The defendant Petrie is the sole gainer ; on these advances he has acquired opulence. Why has the work not been completed ? What excuse has the contractor ? He presents, in substance, the two following :—

1. That the company failed to comply with their agreements, and that, thereby, he was prevented from discharging his.
2. That, upon final settlement, he was released by the company from all demands on the score of his contract.

We insist, that, upon a fair interpretation of the agreement, the proofs show no default, in the company, of which he can avail himself ; and that the alleged settlement and release are void, as to creditors, being without consideration, and fraudulent.

A brief examination of the points of defence set up will show that they are not tenable.

The defendant insists that the company failed, in two particulars, to comply with their contract.

1. In not making the advances, and furnishing the means to complete the work.
2. In not procuring the right of way.

To understand the obligations of the company, arising out of the agreement, we enumerate them. They agree, in consideration of the covenants of Petrie,

1. To pay Petrie \$204,000 for completing, and putting into complete operation, &c., the road from Pearl river to Brandon, and two dollars per cubic yard for the excavation of any rock he might encounter.
2. \$20,000, within one month after the commencement of the work, and then in payments, at intervals of about thirty days, as the money might be required by Petrie for the prosecution of the contract, &c.
3. To invest Petrie with authority to draw bills on the bank for \$100,000.

These constitute all the engagements of the company which can be drawn from the contract. Were they complied with ?

It is admitted, the bills were drawn and accepted. To that extent the payment was made on the contract. The work was com-

Wright, et al. v. Petrie, et al.

menced about the month of April. The balance, which would be due to Petrie on completion of his contract, over and above the advance of \$100,000, would be \$104,000. Supposing him to be entitled to draw this, monthly, during two years, under the contract, he would have been entitled to receive about \$4300 cash, in every month. Now the proofs show that he had received, besides the advance on the 1st May, 1837,

\$5800

In May,	4000	in all	.9800
" June,	10,000	"	19,800
" July,	5140	"	24,940
" August,	2000	"	26,940
" September,	3000	"	29,940
" October,	3000	"	32,940
" November,	10,780	"	43,720
" December,	6050	"	49,770
" January,	47,400	"	97,170
" February,	1000	"	98,170
" March,	24,100	"	124,270
" April,	12,600	"	136,870

Admitting that the excavation of rock would add to the original contract price the sum of \$8000, the whole sum to be paid by the company to Petrie, beside the advance on drafts, would be, on completion of the contract,

\$112,000

Now he received, during the *first year* of his contract, 136,870

Being more than the whole amount which would be due, \$24,870

These calculations, founded upon the proofs furnished by defendant himself, show, conclusively, that there is no pretence for his assertion, that the company failed to make the necessary advances or payments to enable him to complete the work. Besides, there is not one word of proof, that he, even during the first year, made any requisition for money which was refused. Had he sought to protect himself from liability for non-performance of his duties, he should have shown a positive refusal, on their part, to pay the necessary amounts, after he had formally demanded them. But it appears, that, during the first twelve months after he had commenced the work, he was paid a large amount over and above the amount

Wright, et al. v. Petrie, et al.

which he could have charged, had he completed the work, furnished the iron, and supplied the locomotive, cars, &c. &c.

His defence, on the ground that the company failed to procure the right of way, is equally weak.

By the charter of the company, Petrie, as the agent of the company, was invested with all its powers and authority to procure the right of way: under his contract he was bound, equally with the company, to use the means in his power to effect it. It does not appear that he made any effort so to do. This, however, is readily accounted for. In truth, no hindrance was made until the winter of 1839. The contractor, according to his own answer, and the proofs, had been in peaceable possession of the whole way for two years from the making of his contract. The very fact of actions of trespass being instituted against him, in the latter part of 1839, shows that he was, up to that time, in the occupation of the track of the railway.

The company, then, were not in default. Now, what were the engagements of Petrie, under the contract? They were,

1. To put the road in complete operation in two years.
2. To purchase slaves with the advance of \$100,000, and employ them on the road.
3. To furnish all materials, including the iron.
4. To furnish a locomotive and tender, and eight cars.
5. To use diligence and energy in the prosecution of the work.
6. To pay damages if he failed or did not perform his contract.
7. To mortgage all his property for the faithful performance of his contract.

From the proofs, it is manifest that he has not performed any one of these agreements but the second.

Upon this agreement or contract, there can be no doubt, that, if overpaid, he was liable to refund the surplus. Surely, the mortgage required by the contract was to be a security for such advances.

We cannot doubt, then, that the Chancellor will find that the company have not failed to comply with all the engagements they had entered into, and that the failure has been entirely on Petrie's part. It appears from the proofs, that the contractor has altogether

Wright, et al. v. Petrie, et al.

received about \$390,000, when the whole amount he could claim, upon a full compliance with his contract, would be no more than \$212,000.

He has furnished nothing on his contract, and is liable for the whole amount received by him.

The abstracts, briefs, and calculations, submitted by Cocke and Evans are referred to, and exhibit fully the results drawn from the whole testimony.

The second point of Petrie's defence is the alleged settlement and release.

It is well settled that a debtor, in insolvent circumstances, and more particularly one against whom judgments have been obtained, cannot give away property without consideration, nor release rights of action, legal or equitable. It would be deemed fraudulent and void as to creditors, even though no circumstances of fraudulent intent should be shown. The creditor has a right to inquire into the fairness and sufficiency of the consideration received, and if found unfair or insufficient, it will be set aside, and the debtor required to pay over what was really due to the creditor. The general principle is, that an insolvent debtor cannot release claims of any kind, without receiving a full consideration therefor.

The testimony in this case does not show a formal release. There is no testimony to prove any change in the contract, from the day of its execution. Where is the evidence of any change made in this formal, written agreement between the parties? It is the act of a corporation, made by competent authority. It is not pretended that there exists any formal or record evidence of any alteration having been made in it. The mere occasional statements of directors, or admissions made by them, individually, and not in their corporate capacity, cannot be received as evidence of a corporate act. Corporations act only by votes and resolutions. It would be extremely dangerous to admit the private, unofficial, and unrecorded declarations of directors, to stand as the evidence of solemn contracts; and much more, to permit such loose declarations to prove releases from contracts in writing, deliberately and solemnly made. All testimony of this character should, therefore, be discarded. We

Wright, et al. v. Petrie, et al.

are, then, left with no proof on the subject of the release, but the resolutions of the board, passed Dec. 21, 1839. (See them.)

These resolutions do not profess to release Petrie from any existing claims, arising out of the contract, except that of furnishing the locomotive. They do not pretend to state that any settlement had taken place. No evidence of a settlement appears to exist on the books of the bank. There is no record of it. There is no release from the original contract. Give these resolutions their full weight, and they could not be construed into a release of the existing claims of the company against Petrie. But the resolutions, on their face, show fraud. Petrie is released from furnishing a locomotive, and instead of being charged therewith, he is directed to be credited with the price. The cashier is directed to cancel the mortgage of record on the books of the bank, without any reason assigned, and without any consideration expressed. It is recited that the company are under obligations to furnish Petrie with a certain amount of par funds. This recital is false. It is so shown to be by the books of the bank, by the contract, and by the proofs.

It must be evident that this alleged settlement and release, which it is pretended were consummated by these resolutions, although they are at variance with the proofs introduced to support them, was an effort to screen Petrie from responsibility to creditors, and thus to consummate the series of frauds which the directors of this bank had practised upon a credulous public.

But little longer than a year previously to this pretended settlement and release of Petrie, these directors had invited the scrutiny of the bank commissioners. They caused to be published a report, in which it was represented that the bank had available cash resources to the amount of many millions. It is known that, after the publication of that report, their circulation increased, and few, if any, of the liabilities of the bank had been redeemed. Yet, in the short space of about a year, they represent themselves unable to meet *small advances* in par funds. The object of this report was, to give confidence to their issues, and to extend their credit. The country was duped by these false representations. Petrie appears to have aided in the fraud. He furnished a statement (see his letter to Shelton), in which he represented the investment of the com-

Wright, et al. v. Petrie, et al.

pany in the railway, on the 2d of August, 1838, to be \$239,035. He afterwards saw this representation go to the world, without contradiction, knowing its object, and, by his silence, assenting thereto. He knew also of the sale a short time afterwards, by these very directors, of large sums of their own money for less than half its nominal value ; according to his own answer, he participated in it. It appears that within a short twelvemonth all these immense cash resources had vanished, under the superintendence of these worthy trustees ; that the duped public began to consider the issues of the Brandon Bank as almost worthless ; that the directors continued to throw them out, while they possessed any value, and were very lavish to Petrie ; and, in the latter part of 1839, after the judgments now sought to be enforced were obtained, it is proven that this bank was *insolvent*. At this time, when these trustees should have collected and husbanded the remaining resources of this bank, for the benefit of creditors, who had trusted them upon their public expose of abundant resources, they set about releasing themselves and their favorites from heavy responsibilities. The bare recital of the proceedings, which took place on the pretended settlement of Petrie's accounts, proves the recklessness with which they were disposed to throw away the assets still under their control. To give some color to their proceedings, they invite several respectable gentlemen to be present. Their testimony, however, shows they neither participated in the matter, nor understood it. The directors met; the settlement of an important account, involving \$400,000, was before the directors. No communication in writing on the subject appears to have been made, no reference to a committee, no resort to books or accounts, no calculations made, and no cashier present. The unusual course of having the parties, W. and F. H. Petrie, present in person, was adopted ; no account current, no investigation, no record of settlement made ; not a paper exhibited, but the extraordinary "*proximate estimate*," which bears upon its face the stamp of deception, and that not even preserved by the directors. Take these proceedings, in connection with the prior conduct of Petrie, in taking a release from all claims before his visit to New Orleans, to avoid garnishment as a debtor of the bank, in connection with the fact of his having amassed a large estate from small means, with the

Wright, et al. v. Petrie, et al.

then condition of the company, and who can for a moment doubt that these hasty and informal proceedings were devices to screen a debtor from the just claim of the creditors of the bank. If we now conclusively show, that double the contract price had been paid to Petrie, can it be supposed that the directors were not fully advised of the amounts which had been paid? We will not dwell farther upon this pretended settlement. The falsehood and contradictions of the testimony, in relation to what was done, show the desire to screen Petrie, and exhibit and stamp the whole proceedings with fraud.

If this pretended settlement be set aside, or disregarded as fraudulent, or the pretended release without consideration, the original contract of mortgage remains in full force, and the only inquiry of the Court will be, what is now due thereon? for this we claim a decree, and that the property mortgaged may be sold for its satisfaction.

By the CHANCELLOR. Although the papers in this case are very voluminous, and many points have been mooted by counsel on either side, yet its merits lie, comparatively, within a narrow compass. The complainants, as the judgment creditors of the Mississippi and Alabama Railroad Company, have levied an execution upon a number of negro slaves in the hands of the defendant, Petrie, in which they allege the said company has an equitable interest, which they ask to have applied to the payment of their judgments. The facts of the case are substantially these:

On the 23d of Feb., 1837, Petrie contracted with that company to construct a railroad from the town of Brandon to the town of Jackson, and agreed to furnish all the materials therefor, and also a number of cars, a locomotive engine and tender, and everything else necessary to the construction and finish of the road, and to put the same in complete operation, within two years from the date of the contract; the company agreeing to pay him \$204,000, at such intervals as the prosecution of the work might require. One hundred thousand dollars Petrie was to lay out in negro slaves, to work on the road, and was to give a mortgage upon them, and all his other property, as security for the faithful performance of his contract. The com-

Wright, et al. v. Petrie, et al.

pany also bound themselves to pay as an extra charge, not exceeding two dollars per cubic yard, for any excavation that might have to be made through rock. It appears, that Petrie purchased with the advance made to him by the company the slaves levied on by the complainants, and continued to work on the road, until, in December, 1839, at which time it is alleged, that by a fraudulent combination with the company, he abandoned the road in an unfinished and worthless condition, after having received more than the amount of money agreed to be paid to him, for the completion of the whole work, and for furnishing cars, locomotive, and other appendages necessary to put the road in full and complete operation. The complainants insist, that as to them, Petrie is still to be regarded as the debtor of the company, at least, to the amount of money received by him, over and above the value of the work actually done, and that that sum should be decreed to the satisfaction of their judgment, by enforcing the equitable mortgage growing out of the contract upon the slaves and other property. Petrie denies that he is in any way indebted to the company, or that they have any claim upon the slaves, and insists upon a settlement had with them, by which he is released from all liability on his contract, and the mortgage ordered to be cancelled.

The argument of counsel, upon this statement of the case, suggests the following questions for examination :

1. Whether, at the time of the alleged settlement and discharge, Petrie was really the debtor of the company.

2. Whether that indebtedness was released by the company without payment, and without any just consideration ; and if so, whether such release must not be regarded as fraudulent and void in law, as against the complainants, who were then the judgment creditors of the company.

3. Whether the nature of Petrie's liability to the company is of that character, which may be pursued in equity ; and, whether the complainants show a case which authorizes them to sustain such bill for that purpose. These inquiries will be disposed of in the order in which they are stated.

1. Upon the first question, it may be confidently stated, as the result of the whole testimony upon the subject, without going into a

Wright, et al. v. Petrie, et al.

critical analysis of the proofs, that Petrie had received, at the time when he abandoned the road, and obtained a discharge from his contract, a sum of money greater than the amount agreed to be paid by the original contract, and, at least, equal to the additional sum claimed by his answer, on account of his contract with the Jackson and Brandon Bridge Company, which he insists was assumed under his contract for the construction of the railroad. In the face of these opposing facts, it is, however, insisted, that Petrie's failure to complete the road was the result of the failure of the company to furnish him with the necessary amount of funds, and their neglect to procure the right of way for the location of the road. These excuses seem to have originated since the commencement of this suit. It is true, some of the defendant's witnesses state, generally, that the company failed to comply with their part of the contract ; but at what time ; on what occasion ; in what particular ; or to what extent, is left wholly unexplained and undefined by any part of the testimony. Other witnesses state, in vague and general terms, that the company failed to furnish the defendants with par funds. But at what time the demand was made ; whether before, or after the expiration of the time in which the contract was to be completed ; whether, at the time of such demand, an advance was necessary to the due progress of the work ; or whether such demand was made before, or after the company had already advanced an amount greater than that called for by their contract, are questions which the testimony leaves entirely unanswered. And yet, direct evidence on these points was indispensable to establish the alleged default of the company. To discharge one party to a contract, on the ground of the failure of the other to perform his part, such failure must be clearly established, by full, direct, and satisfactory evidence. Opposed to these general statements is the testimony of W. H. Shelton, president of the company, who says, on cross-interrogatory, that he does not believe that the company was in arrear to Petrie on account of his contract, at the time when he ceased to work on the road. The deposition of *Wm. G. Bullock*, who was book-keeper and teller of the company, proves, that upwards of four hundred thousand dollars had been advanced on account of the road, up to the 18th of November, 1859 ; more

•Wright, et al. v. Petrie, et al.

than a month previous to the time at which the work is alleged to have been abandoned for the want of funds to carry it on. Shelton says, that including the money advanced to obtain the iron rails, there had been advanced the sum of \$312,000 ; and Petrie himself admits, by the exhibit to his own answer, that he had received the sum of \$296,000, a sum greater than the amount which would have been due him according to his own claims, and it will appear that a large portion of this amount was advanced during the first year of the contract. Now, what did the company receive in return for this large sum of money ? It is admitted, that no turn-outs, platforms, water-stations, warehouse, nor engine-house had been built. No cars nor locomotive had been furnished, and no bridge built over Pearl river ; and yet, all these were to be done and furnished for a less sum of money than was actually received. Thus it will appear, that not more than half the work was done ; and that nothing was furnished necessary to put the road in complete operation, according to his contract, at the time when he abandoned it. From this view of the case, I think it evident, that there was no failure on the part of the company to supply the necessary funds ; and that it is equally evident, that Petrie was, at the time of the alleged settlement, largely in debt to them, for advances made to him on account of the contract. There is equally as little ground for holding, that he was prevented from completing the road, for the right of way, along the tract over which the road was to pass. There is no proof, to show that there was any interruption or delay on this score, during the two years, within which the contract was to be completed ; on the contrary, he appears to have had the undisturbed control over the entire way ; for he states in his own answer, that the grading was done the entire length of the road, and nothing further seems to have been attempted by him towards its completion. I then conclude, upon this feature of the case, that Petrie was not hindered from performing the work, either by the want of means, or the want of the right of way ; and that having received large advances, and abandoned the road without finishing it, he must have been the debtor of the company, when they ordered him to be released and discharged from his contract. If any embarrassment existed as to means, it may

perhaps be accounted for by the fact, that Petrie vested some forty or fifty thousand dollars in slaves, over and above the amount authorized by his contract, instead of applying it to the construction of the road.

2. The next question in the order of investigation, involves the nature and character of the alleged settlement, by which it is insisted, that Petrie was discharged from all liability to the company. Without stopping to inquire whether this settlement was consummated by the company, with such forms and solemnities as would give it validity as a corporate act, I proceed at once to inquire into its substance and effect upon the rights of the complainants, supposing it to be duly and technically executed. It is to be regretted, that the testimony in the case sheds so little light upon this branch of the subject. There is nothing to show that there ever was a mutual accounting between the parties. There are no items of charge and discharge ; no balance-sheet struck, nor anything else, going to show what constituted the basis of the settlement. The resolutions upon the subject simply declare, that Petrie is discharged, and direct the mortgage to be cancelled ; but whether any consideration passed ; whether there was any settlement of accounts, or whether the resolutions were purely voluntary, are matters which are nowhere fully explained. There is, to be sure, a singular paper filed with the answer (as exhibit N.), bearing no date, and having no one's name, or other mark of authenticity, but which professes to be "an approximate estimate" of damages sustained by Petrie, by reason of the assumed failure of the company to comply with its part of the contract. In this paper, the most extravagant and speculative *data*, having no foundation in the facts and principles of the case, are assumed, as grounds for the calculation of damages ; and then, the round sum of *eighty-five thousand six hundred dollars* is set down as the result ; which sum, it is assumed, might, upon certain contingencies, have been either made on the one hand, or saved on the other. And the answer informs us, that, by this process, Petrie brought the company in debt, and that they agreed to allow his claim for damages, so far as to balance the *money accounts* between the parties.

A settlement made upon such vague hypothesis, and upon such

Wright, et al. v. Petrie, et al.

loose and speculative principles, relinquishing assets of an insolvent debtor, must be regarded as purely voluntary ; and can have no claim to validity, when opposed to a judgment creditor. It seems to have been of a kindred character to another settlement, spoken of by some of the witnesses ; in which Petrie was given a formal discharge from all his liabilities, when about to proceed to New Orleans, in order to prevent him from being garnisheed there, by the creditors of the company. But I consider it perfectly immaterial to this controversy, whether fraud, in fact, was intended by this settlement or not. It is a matter of public history, and is also attested by the evidence in the case, that this company was then on the eve of hopeless insolvency, and that the directors were dealing with its assets in the most reckless manner. A voluntary transfer, or relinquishment of any portion of its assets, under such circumstances, is, within the contemplation and policy of the law, fraudulent and void as against creditors. The directors were the trustees of the corporate funds, and were bound to administer them in good faith, for the benefit, alike of the stockholders and creditors of the institution ; and any one receiving such funds, from their hands, by voluntary transfer, or upon a mere assumed and colorable consideration, would, upon general principles, be bound to account to those for whose use such funds were held. I think, then, that it is sufficiently established, that Petrie was in debt to the company for advances made to him, at the time of the alleged settlement, and that that debt was released without any valuable consideration being received therefor. The claim to damages, by which this debt was balanced, is wholly unsustained by any fact in the case. Even Petrie's answer shows that it is utterly groundless. It will be recollectcd, that the assumed basis for this claim is the injury sustained by reason of the failure of the company to furnish the requisite funds ; and yet the answer shows that Petrie was so far indebted for advances made, as to make it necessary that he should get up a claim for \$85·600, in imaginary damages, in order to balance accounts.

3. The next question is, whether the nature of Petrie's liability to the company is of that character, which may be pursued in equity by a creditor of the company ; and whether the complain-

Wright, et al. v. Petrie, et al.

ants show a case which authorizes them to sustain a bill for that purpose. In regard to the first branch of the inquiry, it seems now to be the rule in England, that in order to render a conveyance void, made by a debtor, it is necessary that the conveyance should embrace property liable to be seized by an execution at law, and applied to the payment of the debts of the grantor. As a consequence of this doctrine, it has been held, that a voluntary transfer of stock, choses in action, or other property not liable to be taken in execution, is good, notwithstanding the provisions of the statute of 13 Elizabeth.

It is said the provisions of that statute do not enlarge the remedies of creditors, nor subject to their demands any property of the debtor, which was not at law, or in equity, previously liable. Roberts on *Fraud*. Con. 421, 422; Atherly on *Mar.* Sectt. 220, 221; *Dundas v. Dutens*, 1 Ves. jr. 196; *M'Carthy v. Gold*, 1 Ball & Beatty, 390; 2 ib. 223; 1 Story's Eq. 361.

Such a distinction seems to me to be utterly inconsistent with the rights which result from the relation of debtor and creditor, and has no foundation in sound morals or just reasoning. It makes the right of the creditor depend upon the form and character which the fraud or caprice of the debtor may give to his property. It is difficult to perceive any solid reason why the intangible property and effects of a debtor should not be subjected to the payment of his debts equally with his chattels, which may be the subject of seizure and sale, under an execution at law. The abstract right of the creditor is as perfect in the one case as in the other. The spirit of an enlightened jurisprudence requires that the property, rights, and interests of the debtor, whatever may be their form, if they have an ascertained value, should be subject to the payment of his debts. Any other rule leads to fraud upon the creditor, and encourages dishonesty in the debtor; who would only have to convert his property into the bond or promissory note of a third person, or into stock of some kind, and then settle the same on his family, in order to obtain a perfect immunity from his creditors.

A rule so fraught with mischief, and so subversive of the plainest dictates of reason, has no other support than that derived from the rule, which exempts mere choses in action from execution.

Wright, et al. v. Petrie, et al.

From that rule it is concluded, that as the creditor has no lien he has no right to follow the choses in action of his debtor, in the hands of a voluntary assignee. The reasoning by which this rule is supported is too purely artificial and technical to find any sanction in a court of equity ; it is fully answered by the language of Lord Hardwicke in the case of *Edgell v. Haywood* (3 Atk. R. 357), where he says ; "The court does not proceed in such case, on the ground of a lien, but only considers it a part of the property of the debtor, which the creditor cannot come at, without the aid of this court." The modern English doctrine upon this subject was fully examined, and its unsoundness as fully exposed, by Chancellor Kent, in the case of *Bayard v. Hoffman*, 4 John. Ch. Rep. 451. The same question was also ably examined, in the case of *Hadden v. Spader*, 20 John. R. 554.

In that case it was held, that the mere choses in action of a debtor might be followed into the hands of a voluntary assignee, and subjected in equity to the payment of a judgment creditor's claim. The same doctrine has been recognized by the Supreme Court of Kentucky. In the case of *West v. Saunders* (1 A. K. Marsh. Rep. 108), it was held, that an assignment of a debt, made with an intent to delay or defeat creditors, may be reached by them, whether they have a lien or not. But if precedents were wanting, I would now establish one in analogy to the proceeding authorized at law by our statutes, in favor of a judgment creditor, whose debtor has no visible property upon which an execution can act. In such case, he may garnishsee the debtor of his debtor, and have the means of the former applied in satisfaction of the debt of the latter ; and, surely, the remedies of a court of equity should be equally as broad and comprehensive as those of a court of law. But in this particular case, the defendant's counsel suggest these additional objections to any relief. 1. That if there is any liability to the company, on the part of Petrie, it consists in unliquidated damages, that can only be ascertained by an action of covenant on the contract ; and that it is not therefore such an interest as can be pursued by the creditors of the company, either at law or in equity. 2. But that, at any rate, the liability of Petrie to the company amounts to mere equitable assets, and cannot be reached

Wright, et al. v. Petrie, et al.

by the complainants, until they have exhausted their remedies at law by a return of *nulla bona*, to an execution on their judgment, and that there is no evidence to that effect. 1. As to the first objection, I am fully satisfied, upon a fair construction of the agreement between the parties, that the mortgage to be given by Petrie was not only intended as a guaranty for the performance of the work, but was equally designed, at least, indirectly, to cover the amount of money that might be advanced upon the contract, in case the work was not done. What was the object of the mortgage? It is admitted that it was designed as indemnity to the company, against any loss or damages they might sustain by reason of Petrie's failure to comply with his part of the contract.

I pause here to inquire, in what items would the damages, thus provided against, chiefly consist? By the terms of the contract the company was to advance large sums of money, at short intervals, and in such sums as the prosecution of the work, and the purchase of the necessary appendages, might require. It is too clear for argument, that these sums of money would constitute the leading criterion, in fixing the *quantum* of damages that might result from Petrie's failure to complete the road, and are therefore, in legal contemplation, clearly embraced within the mortgage. To this extent the damages would be regarded as liquidated; and, in this point of view, I must consider the mortgage as an undertaking, by Petrie, to refund the money agreed to be advanced, if he failed to perform the work, rather than as an indemnity against any speculative injury which might be sustained by the company, by reason of his failure to complete the road within the time prescribed by the contract. 2. Whether the second objection is well taken or not, must depend upon the facts of the case. I have repeatedly decided, in accordance with the current of authority upon that subject, that to entitle a judgment creditor to come into this Court, for the purpose of having his judgment satisfied out of the equitable assets of his debtor, he must show that he pursued his remedies at law to every available extent, without being able to realize his debt. Such a showing is of the substance of his right to relief in this Court, and is not waived by a general answer. *M'Elvain v: Willis*, 9 Wend. 548; 4 John. Ch. 671, 681, 687.

Wright, et al. v. Petrie, et al.

The foundation of his right to relief here, is, that he has none at law. The usual evidence in support of that proposition, is an execution returned no property found. It remains to be seen, whether the complainants have brought their case within the rule laid down. It appears that they have two distinct judgments at law against the Mississippi and Alabama Railroad Company. Upon one of these an execution was levied upon some town lots, which were sold for a small sum, and the sheriff returns that there was no other property of the defendant out of which to make the remainder of the money due on the execution. The first execution on the other judgment was returned no property found. Subsequently, executions were issued on both judgments, and levied, in part, upon the slaves mentioned in the bill ; upon which Petrie, in his bill, enjoined any sale thereof, setting up title to the property in himself. At this stage of things the commissioners filed their bill, alleging that the defendants in the judgments have an equitable interest in the property levied on by these executions, and praying that that interest may be ascertained, and subjected to the payment of their judgments. The evidence furnished, by the return of *nulla bona* to both executions, sufficiently establishes the complainants' right to equitable relief in the premises, unless the presumption thus raised is disproved by the subsequent levy on the slaves and other property. The defendants' counsel say, that the case shows that there was a levy on property under the execution at law, still subsisting and undisposed of, at the time of the filing of the bill. This is very true ; but the bill also shows, that the interest of the defendant in execution, in the subject of that levy, is of a character that cannot be subjected to sale under a judgment at law ; and hence results both the right and the necessity of coming into this Court to make that levy available. The bill, therefore, as well as the facts of the case, are in support of the conclusion resulting from the return of *nulla bona*; because, they show that the defendants in execution have nothing which can be reached by process at law. The position taken by counsel would leave the complainants entirely remediless. If they attempt to move at law, they are met with the objection, that there is nothing in the subject of the levy upon which an execution can act : if they come into equity, the pendency of a levy at law is pleaded as an

Wright, et al. v. Petrie, et al.

estoppel to any relief here. The case of *Perry v. Nixon* (1 Hill's Ch. Rep. 336) is a decision upon this very point. It was there held, that a judgment creditor, who had levied an execution upon the equitable property of his debtor, was entitled to the aid of a court of equity in subjecting such property to the payment of his debt. In the case of *McDermott v. Strong* (4 John. Ch. Rep. 691), Chancellor Kent, referring to the equitable interest of a debtor, says the creditor must first take out execution and cause it to be *levied* or returned, so as to show thereby that his remedies at law fail. I am satisfied from these authorities, and upon principle, that the defendants show sufficient in this particular to entitle them to the relief asked. I do not find it necessary to determine, in this case, whether the complainants could sustain a bill without having first pursued a course at law, upon the ground of a *trust* in the corporation for their use. Such a bill was sustained under very similar circumstances by Mr. Justice Story, in the case of *Wood v. Dummer*, 3 Mason, 308. I think the complainants have gone a sufficient length at law to entitle them to invoke the aid of this Court.

I had some doubt, upon first looking at this case, whether the contract was not to be regarded as mutual and dependent in its parts, and as entire and indivisible in its nature; and whether, as a consequence thereof, Petrie would not be bound to refund the whole amount of money received, without retaining anything for the amount of the work actually done, he having abandoned his contract without sufficient cause. But, upon a more careful consideration of the features of the case, I think he is entitled to retain an amount equal to the actual value of the work done, to be determined with reference to the amount to be paid for the whole work. In the first place, his abandonment of the work seems to have taken place with the assent of the company, which of itself would bind them to pay him as on a *quantum meruit*. In the next place, the company was bound to pay him in instalments, as the progress of the work required, and not when the work was completed. This I think must be construed as an agreement to pay so much at different periods as the work then done might be worth. This was the construction placed by the Supreme Court of New York, in the case of *Cunningham v. Morrel* (10 John. Rep. 205), upon a contract very similarly

Wright, et al. v. Petrie, et al.

worded. In that case, the plaintiff had contracted to build a piece of turnpike-road, for which the defendant was to pay \$6000 *in instalments, as the work progressed.* The Court held, that the plaintiff would be entitled to recover a ratable part of the money upon showing a ratable performance of the work; but that, if he went for the *whole* consideration, he must show a performance of the *whole* work. Upon the whole, I think that I am bound to declare the settlement and release made to Petrie as fraudulent and void, as against the complainants, as the judgment creditors of the company; and shall refer the case to a commissioner, to take testimony and to state an account, showing what amount is due from Petrie to the company, after allowing him a ratable sum for the work actually done on the road, to be ascertained with reference to the *whole sum agreed to be paid for the whole work.* I give no opinion now upon the point, whether Petrie will be allowed to pay such balance, when ascertained, in the depreciated paper of the company or not. That and all other questions are reserved until the coming in of the report. Let a decree be drawn accordingly.

DECEMBER TERM, 1843.

DANIEL W. WRIGHT, et al. v. W. PETRIE, et al.

An application for an appeal from an interlocutory decree of the Chancellor, where money is not required to be paid, or property transferred by the decree, is addressed to the discretion of the Chancellor, and will not be granted, if any important principle in the cause remains undecided.

IN this case, at a previous day of the term, the Chancellor delivered an opinion, which will be found in the former portion of this volume; an application was subsequently made for an appeal from the interlocutory decree ordered, referring the cause to a commissioner, to state an account between the parties, in the manner and on the terms embraced in the opinion referred to, and which were stipulated in the decree.

The motion for an appeal was submitted to the Chancellor, who afterwards delivered the following opinion, overruling the motion.

By the CHANCELLOR. I have bestowed such examination and reflection, in the interval of the sessions of the Court, as I have been enabled to do, upon the application made in this case, and have come to a conclusion satisfactory to myself.

The complainants, being the judgment creditors of the Mississippi and Alabama Railroad Company, have exhausted their legal remedy, and come into this Court to subject alleged equitable assets of that company, in the hands of the defendant Petrie, to the payment of their debt.

They allege that the defendants, the Mississippi and Alabama Railroad Company, commonly known as the Brandon Bank, had employed their co-defendant W. Petrie, to build a railroad; Petrie executed a mortgage to the company, which, in the opinion I pronounced in this case, I held to be still a mortgage, and subject, by the rules of equity, to the complainants' debt.

The pleadings and proofs furnished me no precise data of the indebtedness of the defendant Petrie to the company, and I ordered

Wright, et al. v. Petrie, et al.

a reference of the cause to a commissioner, to determine the amount of that indebtedness, and also what credits he was entitled to, according to the rules laid down in my former opinion. This was the extent of my decree; it was a mere decretal order; not attempting to settle all questions made in the suit, but simply the liability and attitude of the defendant Petrie.

There is now a motion for an appeal, founded upon a statute of this State, authorizing appeals from an interlocutory decree, and decretal orders of this Court, under certain prescribed circumstances.

In England, applications for appeals from decrees of the Chancellor address themselves to the discretion of the Court, except when the Court or the House of Lords have prescribed precise rules for their regulation. There is no statute in England regulating the right of appeal from the court of chancery; but the rights of parties have been as carefully guarded and as well secured as in any country, by the rules which have been adopted for the practice of the Court, and which have also been recognized by the House of Lords. By their practice, I find that no appeal is granted from a decretal order, unless all the questions involved in the case are fully settled, and passed upon in the decree, from which the appeal is sought.

The legislation of this State is apparently indebted to the rules of the English courts, which they seem to have in great part followed.

By these rules, an appeal lies only from a final decree; in practice, however, they have been somewhat modified; and our statute has adopted the modification of the modern practice.

It must be apparent to reason and common sense, that appeals granted from any but a final decree will be productive of great delay, injury, and oppression; showing, upon the most solid reasons, the correctness of the general rule, allowing appeals only from final decrees. The modifications of that rule, which I have alluded to, have kept in view the reason and foundation of the rule itself; and embrace and apply only to those interlocutory decrees and decretal orders, which settle all the questions involved in the issue.

The statute under which this application is made, and by which appeals from decrees which are given during the progress of a suit

Wright, et al. v. Petrie, et al.

in this Court are allowed, grants such appeals from such decrees, only where by the decree, in the first place, money is ordered to be paid by one party to the suit to another; in the second place, where the possession of property is changed or transferred; or, in the third place, where, in the opinion of the Chancellor, for his direction and guidance in settling the principles of the case and the questions involved in it, or to avoid expense and delay, he may think such an appeal necessary.

In this case no money is to be paid or property transferred, and it is only upon the last ground that the appeal is asked; it is addressed to the discretion of this Court.

I have already given an opinion in this case upon some of the questions involved in the merits of the controversy; to that opinion I am bound to give a certain degree of weight; with whatever hesitation and diffidence I may and do regard the opinions which I deliver, and however anxious I may be, and indeed always am, wherever a party feels aggrieved by any opinion I may deliver, to give him the benefit of an appeal to another tribunal, yet I am still compelled, after having deliberately investigated the case, and given my opinion at length, to pay some regard to that opinion. The mere fact that it does not meet the approbation of counsel, whose client's interests it may decide against, is not of itself evidence that the opinion is incorrect, or that, if an appeal is taken, the decree will be reversed; and yet, to grant an appeal in this case, for the purpose of preventing delay, is to imply that my opinion already delivered is erroneous, and will upon appeal be reversed; a conclusion which may be true, but one which I do not feel myself compelled to adopt; and if the opinion I have delivered be not reversed, the very delay which the statute was designed to prevent will be thereby occasioned. By reference to that opinion it will be seen, that several important questions are yet reserved; among them, the right of Frederick Petrie, adverse to that of both the other parties. He claims to own, in his own right, a portion of the property in controversy, and I have given no opinion as to his claim. Another important point that I have left open is, the right urged by the defendant Petrie to discharge whatever indebtedness it may be decreed he is under to his co-defendants, the Mississippi and Alabama Rail-

Wright, et al. v. Petrie, et al.

road Company, in the notes of that company, familiarly known as Brandon Bank paper. These questions, when decided, may each constitute of themselves the subject of an appeal ; it is evident, therefore, that I cannot grant an appeal, without defeating the very object of the statute.

This is the language of the statute :

" In any cause depending in a superior court of chancery, wherein any interlocutory order or decree shall be made, it shall be lawful for such court, or the Chancellor in vacation, at any time before a final decree in the cause, to grant an appeal to the Supreme Court, from such interlocutory order or decree, in the same manner, and upon the same conditions, as if a final decree had been made : *provided* that, by such interlocutory order or decree, *money is required to be paid, or the possession or title of property to be changed*, or that the Court or the Chancellor shall think such appeal proper, in order to settle the principles of the cause, or to avoid expense and delay."

I am to determine this application upon the two last branches of the statute ; there are two alternatives, on one or the other of which I am to exercise my discretion.

I certainly cannot certify, as I would be required to do if I granted this application, that I deem an appeal necessary, in order to settle the principles of the cause ; for the simple and obvious reason, that important principles are yet reserved, undecided ; I have not yet attempted to settle some of the most important questions involved in the case ; I have expressly withheld my opinion, on those reserved points, until the coming in of the commissioners' report, to whom I have ordered the reference ; how, then, can I certify, that I deem an appeal proper to settle the principles of the cause ?

Nor can I certify that it is necessary to prevent expense and delay ; as, in my opinion, the reverse would be the effect.

I think that I ought not, with the very view of preventing expense and delay, to grant an appeal from any interlocutory decree, or decretal order, where any important principle remains undecided. In practice, it would be productive of great delay and expense, and would violate that economical feature of American

Wright, et al. v. Petrie, et al.

jurisprudence, which, in the administration of justice in this country, seems everywhere to be regarded as a cardinal point. That litigants in the various courts may have their suits decided in the speediest and least expensive manner, is of the first importance : to authorize repeated appeals in the same case, as would be the consequence of granting applications similar to the one at present applied for, would place the poor litigant entirely in the power of his rich and powerful adversary, who, in the advantages which his superior wealth would give him, by an endless round of appeals, would, in the creation of harassing and vexatious litigation, and interminable expense, weary out and finally defeat his less able and less wealthy opponent, whose poverty would unfit him to cope successfully in so unequal a controversy.

From any view I can take of the case, with every desire to afford the defendant the benefit of an appeal from my decision, I do not find myself at liberty to grant the appeal in this case, at this stage of the cause ; since, by doing so, I would violate the settled rules which should and do regulate the practice on that subject.

DECEMBER TERM, 1843.

JOSIAH NEWMAN v. JESSE MEEK.

Where N. was indebted to M. on his own account, and also collaterally, as surety for Y., and N. makes payments to M. without specifying to which debt they were to be appropriated ; *held*, that the law would apply the payments, made under such circumstances, to N.'s own debt.

Where a bill of exchange was taken by a judgment creditor from his debtor, the amount of which, if paid, was to be credited on the judgment, and the bill was not paid ; *held*, on a bill filed by the judgment debtor, to enjoin so much of the judgment at law, that the judgment creditor must either credit the judgment, or deliver back the bill of exchange.

THE bill in this case was filed by Joseph Newman, and alleged, in substance, that, on the 4th May, 1838, Jesse Meek obtained a judgment in the Madison Circuit Court, against the complainant, and John Briscoe, for the sum of twelve thousand four dollars and sixty-five cents, which was the only liability on which complainant was bound by *promise*, verbal, written, or of record, to the defendant, either in his individual capacity, or as administrator of Joseph Meek, deceased. To pay this sum, the complainant and Uriah Newman drew a bill upon Mansell, White, & Co., of New Orleans, for the sum of thirty-five hundred dollars, dated May 9th, 1838, due at nine months, which was received by the defendant, and the net proceeds to be applied to the credit of complainant ; also, to pay the same, Meek received one hundred and seventy bales of cotton, to be shipped, and the proceeds to be applied to the credit of complainant ; the proceeds of which, were \$8903. In proof that said cotton was to be applied to the discharge of the judgment, exhibit A, to the bill, is referred to, which is in these words. " Articles of agreement, made and entered into, and agreed upon this ninth day of May, A. D. 1838, between Jesse Meek and Josiah Newman, witnesseth : that for and in consideration, that the said Josiah Newman has agreed to deliver to said Jesse Meek all the cotton receipts shipped by the said Josiah Newman, to New Orleans, or other places, of all the cotton, raised, produced, and growed upon the said Newman's plantation, known as

Newman v. Meek.

the Agency Place, adjoining the residence of John Montgomery, and his plantation in Carroll county, which he is cultivating in connection with Uriah Newman, and in consideration whereof, aforesaid, of said delivery of cotton, the said Jesse Meek agrees to extend the time of the payment of all moneys, now due and owing to him, in his individual and representative capacity of administrator of Joseph Meek, until the first day of January, A. D. 1839, by the said Josiah Newman. The proceeds of which said cotton is to be *placed as credits* to the said Newman's liabilities, as aforesaid." (Signed) Josiah Newman. Jesse Meek.

Receipt on the back of the agreement, was in these words.

"The said Jesse Meek has received a draft, drawn by Josiah and Uriah Newman, for thirty-five hundred dollars, dated May 9th, 1838, due nine months after date, and drawn on Mansell, White, & Co., New Orleans, La. The net proceeds, when collected, to be applied to said Josiah Newman's credit, May 15th, 1838."

The bill further alleged, that the defendant was endeavoring to enforce collection of the judgment, without giving credit for the amount of proceeds of the cotton, and the bill; and prays that defendant be compelled to account for both, and in the interim for injunction, which was granted. The defendant answered, and denied that the cotton received, and the proceeds of the bill, were to be credited on the judgment; admits one hundred and seventy bales were received, which brought the sum in the bill mentioned, and the bill of exchange was also received, but insists they were all to be credited on another debt, the debt of one W. M. Yates to him; for which complainant, he averred, was responsible, having purchased a tract of land (on which there was a deed of trust, given by Yates to Meek) from Yates, in partnership with one W. C. Beck, with notice of the existence of the debt against Yates, and subject to it. That the bill of exchange on Mansell, White, & Co. had not been paid, and was in suit. That he delayed proceedings under the judgment until after the 1st January, 1839, as agreed, and afterwards tried, by executions, to make the money. Was willing to give credit for the cotton, according to agreement, on the Yates debt, which, if it was done, would

Newman v. Meek.

leave a balance yet due of about \$1000 ; he charges that it is evident that the cotton and bill of exchange were to be credited on the Yates debt, because complainant and W. C. Beck had filed a bill to rescind a sale under the deed of trust, at which sale Meek had purchased. The gravamen of which bill was, that the defendant had agreed to give time upon getting the crops from year to year, which is the same agreement attempted to be set up in this case, and then when they were unprepared for a sale, in consequence of the agreement to delay, in violation of his agreement, and for the purpose of purchasing at a reduced price, Meek had sold under the deed of trust. He makes his answer a cross-bill ; Newman answered the cross-bill, and says, that the bill filed by him and Beck, was filed by Beck, and complainant knew nothing of its charges.

The witness, C. C. Shackleford, for complainant, proves that he drafted the written agreement referred to, and at the time it was prepared understood, from the conversation of the parties, that the cotton and bill were to be credited on the judgment. *He states that the bill had not been paid.*

The witness Thomas Shackleford states, that he heard a conversation between complainant and defendant, in which they disagreed as to what account the payments were to be credited, and he refused to decide between them. He was the attorney for Meek, in obtaining the judgment, and heard nothing said about time to be given, at the time the judgment was taken.

C. C. Shackleford, for complainant.

The complainant charges but one liability to defendant, Meek, and that, to liquidate that liability, he transferred 111 bales of cotton ; that Meek, by letter, obtained 59 other bales, which sold for \$3903·00, which was placed to said Meek's credit, by N. & J. Dick & Co., who sold the cotton ; that complainant likewise gave a draft for \$3500, which was, when paid, to be given or placed as a credit on complainant's liabilities, and that these amounts, when paid, will nearly or quite balance the amount of the judgment at law. Complainant seeks to have the credit for his cotton, as expressly stipulated by defendant, and that defendant also either re-

Newman v. Meek.

turn the draft or also allow a credit for it. To substantiate all and every allegation in the bill, the exhibits filed, in opinion of complainant, are sufficient ; that his agreement was also separate and distinct, the exhibits also prove ; that Meek agreed that complainant's responsibilities alone should be credited, and not the debt of Yates, the exhibits prove ; that the defendant, Meek, knew that the complainant had an eye single to the liquidation of his own, and not the debt of Yates, his receipts to complainant prove. In the opinion of complainant, there are but two principles of law involved in the case.

1st. Is complainant responsible, or bound to pay the notes executed by, or the debt due by Yates, to the estate of Joseph Meek ?

The rule of law applicable to this proposition is too well established, and must be too well known to this honorable Court to require a reference to authorities to settle the point, that, to make one liable for the debt of another, the promise must be in writing, and not upon such testimony as the *belief* of the respondent.

2d. Will the Court receive the answer of the defendant, Meek, that the understanding of the parties was different, and that his, Meek's, understanding was, that the cotton and bill of exchange were intended to be credited on the debt of Yates, and not on the liability of the complainant, when his own signature to his receipts, and the words of the receipt, contradict what he states now, to be his understanding then ?

It is also an established principle, that a party will not be permitted in equity to deny or controvert an instrument in writing, made and signed by himself, by parol, without other proof than his own statement.

If this principle be true, then the answer of Meek amounts to nothing ; he does not deny his receiving the \$8903, nor the bill of exchange for \$3500 ; neither does he deny that the judgment of \$12,004, is the only claim he has against complainant. Then on the bill and answer the injunction should be clearly sustained, until a decree can be had for the proceeds of the cotton, and the bill returned, or a decree for that also rendered.

The only question for decision is, does complainant owe any other debt but the judgment debt of \$12,004.00 ?

Newman v. Meek.

The answer does not show that he does.

Were the proceeds of the bill and the cotton to be placed to complainant's credit, or the debt of Yates? The contracts show it was to be credited on complainant's liability.

Robert Hughes, for defendant, Meek.

1. The bill ought to be dismissed. Because the complainant, by his own admission, in the bill filed by him and Beck, insists, as a ground of rescission, that the agreement was made which is insisted upon in this case, and that it applied to that case. The answer which complainant gives to the cross-bill wont do, because he is yet prosecuting that bill on this ground, and for that reason attempting to enforce a rescission of the sale under the deed of trust.

2d. But, there are other reasons upon the face of the agreement itself; it was not confined to the judgment, and the agreement is to deliver the cotton on Newman's plantation, known as the Agency Place, or the Yates place, in which Beck was interested; and Mr. Beck, in the bill for himself and complainant, had good reason to insist, that the agreement applied to the Yates debt; otherwise the delivery of his cotton, in payment of Newman's debt, would have been a fraud. The bill seems to be filed on the ground, that the cotton and bill were to be credited on the judgment, because Newman had made no promise to pay the Yates debt. The agreement does not speak of any debt in which Newman was bound by promise, but merely his liabilities to Meek, either individually or in his representative capacity. It will not do to say that this was not a debt of Newman because Beck was bound with him; if so, the same would apply to the judgment, because the judgment was against Newman and Briscoe.

The debt against Yates was one of Newman's liabilities, because property held and claimed by him was subject to it, and by his answer he admits he took it *cum onere*; and as long as he held the property and claimed it, it was his debt, his property being bound for it.

3d. The amount of the bill, at any rate, if we are wrong about the cotton, which we do not admit, should not be charged to Meek, because it is alleged in the answer, in reply to a charge in the bill,

Newman v. Meek.

that the bill has not been collected, and is in suit. The proceeds of the bill were to be credited ; until received there will be no proceeds, and cannot be credited. Charles C. Shackleford proves that the bill has not been paid.

W. Yerger, for complainant.

C. C. Shackleford (who drew up the agreement) understood from the parties at the time, that the "liabilities" referred to in it, were, the judgment in Madison county, enjoined in this case, and the one in the Federal Court, which has been paid. He heard nothing which would induce him to suppose that Newman intended to pay off any part of Yates's liability.

Thomas C. Shackleford was Meek's attorney — obtained the judgment enjoined : he never heard of any agreement for an extension of time, as a condition of permitting the judgment to be taken : never heard Newman admit his liability on account of Yates, but heard him state that the cotton shipped was to pay the judgment.

These are all the facts.

No question of law is raised by the record : it is all a question of fact, depending upon the meaning of the term "liabilities" used in the agreement. Upon this point the proof is clear : the answer of Newman to the cross-bill states, explicitly, that it referred to the judgment in Madison county. The agreement bears date on the 9th day of May, 1838 ; the judgment was rendered on the 5th ; and before the rendition there was a virtual agreement, as C. C. Shackleford proves, that an extension of time would be given on it, if Newman would make no defence. The agreement refers to Newman's own liabilities, not those of Newman & Beck, which would be the nature of any that might have been assumed on Yates's account ; and aside from Newman's answer, and the internal evidence of the contract, C. C. Shackleford, who drew up the agreement, states, that he understood the term "liabilities" to allude to the judgment in Madison county, and that in the Federal Court ; thus explaining any latent ambiguity that may be raised.

CHANCELLOR. On the 5th of May, 1838, Jesse Meek recovered a judgment at law against Josiah Newman for \$12,004·65,

Newman v. Meek.

which this bill seeks to enjoin, upon the ground that since the rendition of the judgment he has made payments thereon to the amount of \$8903, by means of the shipment of cotton to the order of Meek, and of \$3500 by means of a draft on Mansell, White, & Co., which, it is alleged, were by agreement to be credited on the judgment. The only question presented by the case is as to the application of these payments. The complainant insists that they should be applied to the judgment here enjoined, while the defendant insists they were rightly applied to the payment of a debt due him from W. M. Yates, which he insists Newman had become bound to pay. There is no testimony to show any such agreement or liability, except so far as it appears that Newman had purchased from Yates some property which stood bound to Meek for a debt due from Yates. He was, at most, only collaterally bound for Yates's debt, and the law would apply any payment made under such circumstances to his own debt, where he was directly bound, even if there had been no agreement to that effect. On the other hand, the written agreement between the parties on the subject of the payments, is proved by the draftsman thereof to have been intended to apply to the judgment against the complainant. The bill of exchange was only to be credited if it was collected. The testimony is, that it has not been collected. Upon this view of the case, I shall direct a decree perpetually enjoining \$8903 of the judgment, that being the proceeds of the cotton receipts ; and as to the remainder of the judgment, the injunction will be dissolved, unless the defendant elects to retain the bill of exchange ; in that event, the injunction must extend so as to include the amount of the bill. If the defendant does not so elect to take the bill, he must be decreed to deliver it up to the complainant. Let a decree be prepared accordingly.

Jenkins v. Bodley, et al.

JUNE TERM, 1843.

JABEZ JENKINS, JR. v. WILLIAM S. BODLEY, et al.

Want of notice protects a purchaser against a latent equity only, not against the legal title; in the latter case, the maxim *caveat emptor* applies.

Wherever the description given in a deed is imperfect, yet sufficient to point inquiry to the true locality and boundary of the land, then the deed is not void for uncertainty, but the defect may be cured by the aid of parol evidence, in giving identity to the premises intended to be conveyed.

A vendee, who would protect himself against a prior equity, upon the ground of being a bona fide purchaser without notice, must deny notice fully, positively, and precisely, even though it be not charged on the other side.

Actual possession of land is constructive notice of the nature and extent of the interests and rights of the occupant.

A court of equity will limit the lien of a judgment to the interest which the judgment debtor actually had in the property at the time of rendering the judgment; so far, at least, as to protect the prior equities of third persons.

On the 1st day of April, 1843, Jabez Jenkins, Jr. filed his bill, alleging that, on the 1st day of November, 1837, Roderick M'Leod purchased of Joshua C. Jenkins a lot of ground, with the improvements thereon, lying in the city of Vicksburg, at the sum of five thousand dollars; and on the same day Jenkins executed to him a deed in fee simple thereto; that in the deed the lot is described as follows, to wit: "Commencing — feet east of the northwest corner of lot No. 201, in square No. 30, on the original plat of the city of Vicksburg; thence east along China-street, 40 feet; thence south $147\frac{1}{2}$ feet; thence west 40 feet; thence north $147\frac{1}{2}$ feet, to the place of beginning"— and refers to the deed; that on the same day M'Leod conveyed to Samuel W. Brown and Thomas A. Marshall, in trust, the same lot, to secure the payment of the purchase-money to Joshua C. Jenkins, and refers to the deed of trust, in which the lot is described as follows, to wit: "Commencing 30 feet east of the northwest corner of lot No. 201," &c., continuing the description in the same words used in the deed. The bill further alleges that, on the day of the purchase, M'Leod was placed in possession of the lot, as described in the deed of trust; that he lived upon, improved, and paid the taxes on it from that

Jenkins v. Bodley, et al.

time till about the 26th day of November, 1839, when it was sold by Brown and Marshall, agreeably to the provisions of the deed of trust, and purchased by Jabez Jenkins, Jr., who occupied it by his agents and tenants, till about the 1st day of June, 1841; when his tenant, without the knowledge or consent of his agent or himself, attorned to William S. Bodley, and has paid him the rent ever since; that Bodley claims and holds the property under a purchase from the sheriff of Warren county, who sold the same as the property of Joshua C. Jenkins, under executions against him, which issued on judgments obtained long since the 1st day of November, 1837. The bill further charges that Joshua C. Jenkins has had no interest in, nor pretended to set up any claim to, nor exercised any ownership over said property since he sold it to M'Leod; that it was notoriously occupied by M'Leod and Jabez Jenkins, Jr., as above stated; all of which was well known by Bodley, at the time of his purchase. The bill charges that the place of beginning in the description of the property, contained in the deed from Joshua C. Jenkins to M'Leod, was omitted by mistake; that Jenkins intended to convey, and both he and M'Leod supposed, until after Bodley purchased at sheriff's sale, he actually conveyed the lot described in the deed of trust, the possession of which was delivered to M'Leod; and prays that Joshua C. Jenkins and William S. Bodley be made defendants; that Jenkins be compelled to correct the mistake in the deed to M'Leod; and that Bodley be required to surrender up his deed and title-papers to be cancelled, &c., and for general relief.

The answer of Joshua C. Jenkins admits, substantially, all the allegations of the bill.

The answer of Bodley admits the executions of the several deeds and deed of trust mentioned in the bill, and the possession and occupancy of M'Leod; the payment of the purchase-money, and improvements of the lot, &c. by him, but denies any knowledge of Jabez Jenkins, Jr.'s interest, until after he purchased at the sheriff's sale. The answer avers that one of the judgments, under which Bodley purchased at the sheriff's sale, was founded on a note given by Joshua C. Jenkins to William M. Pinckard, for part of the purchase-money of lot No. 201; but admits that Pinckard took per-

Jenkins v. Bodley, et al.

sonal security on the note without mortgage, or retaining by contract any lien on the lot.

T. A. Marshall, for complainant.

The pleadings present so clear and strong a case of equity in favor of the complainant, that an elaborate argument is deemed wholly unnecessary. I will first suggest two questions for the consideration of the Court, without attempting to support them by either argument or authority, and then take a brief view of a third, on which the complainant confidently relies for success.

1. Must not the deed from Joshua C. Jenkins to M'Leod, and the deed of trust given by the latter to secure purchase-money to the former — both being executed at the same time, by the same parties — be regarded in law as *one* transaction? And if so, does not the correct description of the property, intended to be conveyed, contained in the deed of trust, sufficiently supply the omission made in the deed?

2. The number of the lot, and square, and quantity of ground, being correctly given in the deed to M'Leod, did he not thereby, at least, become a *tenant in common* with Jenkins in that lot, the latter then being the owner of the whole lot; and could he not immediately have filed a bill and compelled a partition? And if so, was not the putting him in possession of a particular part of the lot, and Jenkins's acceptance of a deed of trust on that part to secure the purchase-money, a legal partition made by the parties themselves?

3. Admitting that the omission in the deed to M'Leod, although clearly a *mistake*, renders it absolutely *void*; or admitting there had not been even "a memorandum in writing" of the contract between J. C. Jenkins and M'Leod; it is confidently believed there could be no doubt, even then, that the complainant's equity should prevail. In that case, M'Leod, having been let into the possession, notoriously lived upon and improved the premises, and paid the whole of the purchase-money, could unquestionably have enforced a specific performance, as against Jenkins. See *Wetmore v. White*, 2 Caine's Cases, 87; *Hutchinson v. Hutchinson*, 4 Desaus. 77. Is, then, a creditor of Jenkins, or a subsequent

Jenkins v. Bodley, et al.

purchaser *with notice*, placed in any better condition than Jenkins himself occupied? What title did Bodley acquire by his purchase at the sheriff's sale? The sheriff sold and conveyed only such right, title, and interest as Joshua C. Jenkins had at the time the judgments, under which the sale was made, were rendered. What was the right, title, and interest, he then owned? In the present view of the case, I answer, the *legal* title, subject to the complainant's or M'Leod's equity; and that was the *only* interest Bodley acquired, he being a purchaser *with notice*; that is, he bought the interest Jenkins had at *that time*, and *no more*. But was Bodley a purchaser *with notice*? He certainly was in *law*, whether he knew in *fact* of the purchase and possession of M'Leod and the complainant, or not. They had notoriously resided on, and claimed the property as their own, for nearly four years; and it is a settled rule in equity, that the *possession* of a tenant is notice to a purchaser of *every* interest of the tenant, and of the *whole extent* of that interest, and the purchaser is bound to admit *every* claim that could have been enforced against his vendor. See 5 John. Ch. R. 29, *Ches-terman v. Gardner*; and 7 Dana, 233, *Yancy v. Holliday*. Indeed, it has been repeatedly decided in Kentucky, that "*actual occupancy* is notice to *all the world* of *every* interest of the occupant." The cases on this point are numerous, and are no doubt too familiar to this Court to require a special reference. In *Mor-ton v. Robards, et al.*, 4 Dana, 258, after an elaborate argument, and a full and critical review of all the authorities, the Court held that notorious possession was notice to purchasers under *execution*, as well as at *private sales*; and that *creditors* and *purchasers* were alike bound by it. Such is also believed to be now the *settled rule of this Court*, which must necessarily be conclusive of this case.

I will notice, however, one other point, which, from the tenor of defendant Bodley's answer, will probably be raised by him. As one of the judgments, under which Bodley purchased, is believed to have been founded on a note, given by J. C. Jenkins to Wm. M. Pinckard, for part of the purchase-money of lot No. 201, of which the land in controversy is a portion, it may be supposed that Pinckard, therefore, retained a *lien* on the whole lot for the whole purchase-money; and that his lien will enure to the benefit of Bod-

Jenkins v. Bodley, et al.

ley. But such a supposition is manifestly erroneous. It will not be denied that a vendor, under some circumstances, has an equitable lien on the estate sold for the payment of the purchase-money ; yet such lien is binding only while the estate remains in the hands of the purchaser. 1 John. Ch. R. 308 ; Hardin, 48 ; 6 Monroe, 199. It will never be enforced against a *bonâ fide* purchaser without notice. See 4 Kent's Com. 154. But whenever the vendor takes other security, proving thereby that he does not intend to rely on the estate sold, his equitable lien is discharged. 4 Kent, 153. Pinckard took personal security on the notes, and did not require a deed of trust or mortgage. He retained, therefore, no lien for the purchase-money, either in law or fact.

CHANCELLOR. Is Bodley a *bonâ fide* purchaser without notice in the legal sense of that phrase ? I think not. 1st. Because the deed conveyed a legal title, and want of notice protects a purchaser against a latent equity only, not against the legal title ; in the latter case, the maxim *caveat emptor* applies. 2. Because the deed was sufficiently descriptive of the lot in question, to leave no doubt about the identity of the property, intended to be conveyed. The description of the lot, as given in the deed, shows that the lot is situated in the city of Vicksburg, in lot No. 201, square No. 30, and begins at some point east of the northwest corner of said lot, and runs from that undefined point, *eastwardly*, along China-street, forty feet. Now, as the deed was duly registered, it was constructive notice to all the world, of these facts, and if they are sufficient to point out the locality of the lot, and to supply by inquiry, information as to the exact boundary of the lot, then the description must be held sufficient in equity, to protect the grantee in the deed against any subsequent purchaser ; because the facts thus shown were at least sufficient to put a prudent purchaser upon his inquiry, and it is well settled, that whatever is sufficient for that purpose, amounts in equity to notice. When the deed from Jenkins to M'Leod is taken in connection with the reconveyance by him of the same lot, in trust for the payment of the purchase-money, in which latter conveyance there is a full and accurate description of the boundaries of the lot, I think they

Jenkins v. Bodley, et al.

must be regarded as conveying full and explicit notice, as to the identity and locality of that lot. Bodley distinctly admits, in his answer, the execution and delivery of these several deeds, but does not answer whether he had notice of them, or not, at the time of his purchase. A vendee who would protect himself against a prior equity, upon the ground of being a *bond fide* purchaser without notice, must deny notice, fully, positively, and precisely, and this, though it be not charged on the other side, and he must also deny notice of all the facts charged as constituting such notice. *Gallatian v. Cunningham*, 8 Cowen, 361. But there is another feature in this case, upon which I think the defendant is chargeable with constructive notice. It is charged in the bill, that M'Leod had open and notorious possession of the lot in question, under, and by virtue of his deed, from Jenkins, up to the time of the sale, under the deed of trust; and that the complainant and his tenants had such possession at the time of Bodley's purchase, under the judgment, against J. C. Jenkins.

Bodley admits in his answer that such was true, but denies that he knew it until after he became the purchaser of the lot. That denial of knowledge cannot impair the effect of the fact of possession. It seems now to be very generally admitted, that where a person is in open and actual possession of land, even though he claim by an equitable title, that possession is sufficient to put a subsequent purchaser upon inquiry, as to the actual rights and the nature of the claim of such occupant; and is constructive notice of the nature and extent of those rights. *Allen v. Anthony*, 1 Meriv. Rep. 282; *Chesterman v. Gardner*, 5 John. Ch. R. 32; *Gouverneur v. Lynch*, 2 Paige, Ch. R. 300; 6 Wend. 213, 226; 2 Mass. Rep. 508; 3 Pick. Rep. 149; *Bayley & Co. v. Walker*, decided in this Court. Freeman, Ch. Rep. 85.

I think the complainant is entitled, upon general principles, to the relief which he asks; by virtue of his purchase under the deed of trust, he stands clothed with the same rights and remedies, which M'Leod would have had, whose right to relief against Bodley's purchase, seems to me, would have stood undoubted. The judgment against Jenkins, under which that purchase was

Jenkins v. Bodley, et al.

made, being long subsequent in date to the conveyance from Jenkins to M'Leod, it is clear, that in equity, at least, Jenkins had no interest in the lot upon which the judgment could attach, and I take it to be clear, that a court of equity will limit the lien of a judgment, to the interest which the judgment debtor actually had in the property, at the time of rendering the judgment, so far, at least, as to protect the prior equities of third persons. 1 Paige, Ch. Rep. 125; 2 Har. & John. 64; Atk. on Con. 512; The Case in 6 Paige, Ch. Rep. 347.

The authorities are full, to show that the deed to M'Leod is not void for uncertainty. The rule is, that wherever the description given in the deed is imperfect, yet is sufficient to point inquiry to the true locality and boundary of the land, then the deed is not void for uncertainty, but the defect may be cured by the aid of parol evidence, in giving identity and locality to the premises intended to be conveyed. 4 Cruise's Dig. p. 221, sec. 29, 33; 4 Mass. Rep. 205; 13 John. Rep. 102; 8 Peters, Rep. 84.

Let a decree be prepared for the complainant, according to the prayer of the bill.

DECEMBER TERM, 1843.

WILLIAM VANNERSON v. GARRETT CORD, *et al.*

A commissioner in chancery, to effect a sale by order of the Court, has no authority or power to substitute one purchaser for another, without the entire assent of the first purchaser.

Where a commissioner makes a sale of mortgaged premises, and the purchaser fails to comply with the precedent requirements of the decree, the commissioner has no authority to receive a bond from another person, of the amount of the purchaser's bid; but the property remains in his hand, as if no sale had taken place.

A commissioner, having advertised the property for sale, upon a failure from any cause to sell on the appointed day, has power, unless his authority is restricted by the decree on its face, or limited to a single specified time, to advertise the property for sale again and again, until he effectuates the object of his appointment.

The powers of a commissioner to sell property, by decree of the Chancery Court, are precisely the same that a sheriff has, when a writ of *fieri facias* is placed in his hands.

THE facts will be found stated at sufficient length in the opinion of the Court.

Bullock, for complainant.

Sanders and Price, for defendants.

We cannot find one single ground for the interposition of this Court, set forth in the bill. If such exist, it is fully denied by the answers. The bill should be dismissed at the costs of the complainant.

CHANCELLOR. I have looked into the bill and answers, upon which alone the case is submitted for final hearing, and find the following state of facts to exist.

The complainant alleges, that he was indebted to the defendants, Cord and wife, and executed a mortgage to secure to them payment: that upon the mortgage becoming forfeited, Cord and wife exhibited their bill for foreclosure and sale, in the Adams Circuit Court, and obtained a decree accordingly: that by that decree, the defendant, Newman, was appointed a commissioner of that court, to sell the mortgaged premises: that in obedience to the decree he made a sale, at which the defendant Sharpe became the purchaser of

Vannerson v. Cord, et al.

the mortgaged property at a specified price : that Sharpe failed to comply with the terms of the sale, in not giving the bond with approved security which was required by the decree.

The complainant, in this state of things, offered to give bond and surety to the commissioner in the amount of the purchase made by Sharpe, and claimed that a conveyance of the property should be made to him. The commissioner declined accepting the proffered bond, and refused to execute the required conveyance.

That refusal of the commissioner, and the allegation that he had advertised the mortgaged property for re-sale, constitute, if any, all the equity of the bill.

There is nothing in the first objection : the commissioner had no right to substitute one purchaser for another, without the entire assent of the first purchaser. The complainant had no right whatever to demand that the commissioner should receive the bond he offered ; nor had the commissioner any authority to receive it : he had sold the property in controversy to the defendant Sharpe, to whom, upon complying with the precedent requirements of the decree, it of course belonged ; upon his failure to comply, the property remained in the hands of the commissioner unsold, and stood as if no sale had taken place.

There is as little in the other objection taken to the course of the commissioner. It presents the question, whether, where a commissioner appointed by a court of chancery has advertised, and from any cause fails to sell, he can advertise for a resale. Whether, in other words, his power and authority are exhausted by his first attempt to sell.

I have previously, in another case, examined and decided this question. I then decided, that unless he was restricted by the decree on its face, or his authority was limited to a sale at a particular time expressly specified in the decree, upon a failure to sell from accident, or the non-compliance on the part of the purchaser at the first sale, he has full power to advertise and sell again.

He has the same powers precisely, that a sheriff has when a writ of *fieri facias* is placed in his hands ; whose power to resell, in case of failure in the first attempt, has never, that I am aware of, been doubted.

Vannerson v. Cord, et al.

As a general rule, decrees of foreclosure and sale do not, specifically, fix the *time* at which the sale shall take place. The statute requires that the *place* shall be mentioned in the decree; but the uniform practice, and the proper one has been, to leave the decree without limitation or prescription as to the particular time when the sale shall take place, permitting the parties interested to exercise a discretion in the matter, and only requiring that the length of time in which the advertisement shall continue, shall be clearly designated.

Until, therefore, a complete execution of the decree takes place, he may advertise again and again, whenever a failure occurs, until he eventually effectuates the object of his appointment.

The bill, in this case, would have been dismissed on demurrer.

Let a decree be drawn dismissing the bill at the costs of the complainant.

JULY TERM, 1842.

SOPHIA BACON, et al. v. MARGARET CONN.

To constitute a valid tender, it must be unconditional, and of a definite and specific character.

Where a tender was made for the purpose of redeeming property sold at tax sale, and after the tender had been made, the person desiring to redeem also requested the purchaser to deliver possession of the property, and cancel the tax deeds; held, that the requests formed no part of the tender, and were not limitations upon it.

If a person makes a tender coupled with a condition, and the tender is positively rejected, without assigning any reason or objection to it, how far the person refusing the tender can afterwards make objections to the form and mode of it? *Quære.*

Where the bill avers the execution of a deed of the 10th March, 1836, and the answer denies the execution of such a deed, and the proof shows the execution of a deed, of the 13th of March, 1836; held, that the variance excluded the deed from testimony.

In such case the Court would allow an amendment, if the variance were accidental.

A court of chancery has jurisdiction to decree a cancellation of a tax-collector's deed, in a proper case.

THE bill shows, that on 10th March, 1836, John Conn, since deceased; and Margaret his wife, conveyed to Joseph Joseph, Hardy Hendren, and others, a certain lot of ground in the city of Vicksburg, being lot 90, in square 16. That on the 19th March, 1836, said Joseph and others made a deed of trust to Everette and Morris, trustees, conveying this lot to secure the purchase-money to said John Conn, which trust, and the note intended to be secured thereby, Conn transferred to William Bacon, since deceased; that Sophia Bacon, and D. Bacon, messenger, the complainants, are executor and executrix of said William Bacon, and sole devisees under the will. That, on the 25th January, 1841, the said notes, then held by transfer from said John Conn, being due and unpaid, said Everette and Morris, trustees, at the request of said Sophia, and D. Bacon, messenger, sold said lot 90, in square 16, under the deed, following in every particular the provisions thereof. At this sale, Sophia, and said D. Bacon, messenger, became the purchasers.

'That on the 7th September, 1840, the lot was sold by the tax-collector of Warren county, for taxes due by Joseph and Hendren,

Bacon, et al. v. Conn.

for the years 1837, 1838 ; and at this sale, Margaret Conn became the purchaser for the sum of \$97,41, and the tax-collector executed a deed to her for the lot. That, on the 23d March, 1841 (within 12 months from the date of the sale), said Sophia learning for the first time, that the lot had been sold for taxes, did, on that day, tender to said Margaret the sum so paid by her, and all taxes and charges since her said purchase, if any, and interest at the rate of 100 per cent. per annum, and requested said Margaret to cancel said tax-deed, or transfer the same to said Sophia and other parties interested, and to deliver possession of said lot. This, Mrs. Conn refused.

That the unjust conduct of said Margaret has caused to complainants great loss in rents of the property ; abuse and neglect of the same.

That since the tax sale, Mrs. Conn had leased or rented the lot to James Hagan, at \$30 per month. That Hagan was insolvent, and if the rents were suffered to accumulate, that the whole would be lost.

That Mrs. Conn was insolvent, and if the rents were collected by her she would be unable to refund them. That Hagan refuses to pay rent to complainants.

Mrs. Conn pretends, that she never joined with her husband in the execution of said deed to Joseph and others, and that she has a right of dower in said lot. Complainant charges this to be false; prays for a receiver to take possession of said property, and to collect the rents and to hold the same, subject to order of the Court ; to enjoin Hagan from paying rents to Mrs. Conn, and that the deed of the tax-collector be cancelled.

The answer of Margaret Conn, admits the execution of the deed to Joseph and others ; denies that she joined in the deed ; admits that the grantees in the deed took possession, and made valuable improvements thereon.

Admits the execution of the deed of trust by Joseph and others, to secure the purchase-money.

Admits the purchase under the tax sale for \$97,41.

Admits the tender by said Sophia with 100 per cent. int., &c., but says it was coupled with conditions, as stated in the bill, with

350 SUPERIOR COURT OF CHANCERY.

Bacon, et al. v. Conn.

which she would not comply ; that the proviso (of delivering possession, &c.) takes away the character of a tender. That she claims possession not only by virtue of her tax deed, but by right of dower.

Demurs to the bill, because complainants have remedy at law.

Admits that Hagan at her (Margaret's) instance, refuses to deliver possession, or to acknowledge himself tenant of said Sophia, &c.

The deed from Conn and his wife to Joseph Hendren, was dated March 13th, 1836, and was in due form, and properly acknowledged. The case was submitted by both parties for final decree.

French and Burwell, for complainants.

W. C. Smedes, for defendant, Mrs. Conn.

The complainants were not entitled to the relief they ask.

1. Because Mrs. Conn is the owner in fee simple of the premises in controversy : her purchase at tax sale was prior to the legal interest the complainants acquired in the property, and her title had become absolute at law under the tax purchase before the institution of this suit ; unless, therefore, the complainants, by the pretended tender in this case, have destroyed the legal title in the defendant, and have entitled themselves to the cancellation of the tax deed, the bill, it seems to me, must be dismissed.

The doctrine of tender is a simple one. The person pleading it, must show an unconditional and unqualified tender of the sum due. If any restriction of any kind is imposed upon the offer, it takes away from it its character of a legal tender, and it amounts in law to nothing. Even the demand of a receipt for the money offered, has been held to violate the tender. *Glascot v. Day*, 5 Esp. N. P. C. 48 ; *Ryder v. Lord Townsend*, 7 D. and R. 119. So also the demand, that a particular document shall be given up to be cancelled, renders the tender invalid. *Husham v. Smith*, 2 Camp. 21. To the same or similar effect are the cases of *Evans v. Judkins*, 4 Camp. N. P. C. 156 ; and *Strong v. Harvey*, 3 Bing. 304 ; and *Brady v. Jones*, 2 Dow. and Ry. 305.

In this case the complainant tendered the money, and requested the delivery of the deed and of the possession. What is a request,

Bacon, et al. v. Conn.

accompanying an offer of money, but a demand? It is but to say, in other words, give me the deed and property and take the money. The statute affixes no conditions upon the purchaser of property at tax sales. The owner, to redeem, must, within one year, tender the sum due. How. & H. 105. In this case the complainant made an abortive attempt at a tender; she grasped at too much and has lost all.

2. The defendant is entitled to possession: she claims a dower interest in the property. The Probate Court is the proper tribunal to allow dower; she denies that she has conveyed her interest. The deed offered in proof is not the one described in the pleadings, and this Court will not disturb the possession of one holding by a title, the allotment and validity of which depend upon the action of another tribunal. How. & Hutch. 351.

3. The defendant is in possession under an adverse title, claiming adversely.

The remedy of the complainants, by action of ejectment, is clear and unembarrassed at law. If the tender was a valid one, it destroyed the right and title of the defendant under the tax deed; and in an action at law, if the defendant should set up her tax title, the question of tender could there be made, and the facts investigated.

By the CHANCELLOR. Two questions are presented to me, by the facts of this case: 1, as to the sufficiency of the tender, and 2, as to the defendant's claim to dower in the premises.

It is contended, in the answer of Mrs. Conn, that the alleged tender, by the complainant, was coupled with a condition that she was not bound to comply with, and which destroyed its claims to be considered a legal tender. And her counsel, in argument, insist strenuously, upon the same position. If the position taken in argument be true, that the tender was made upon a condition, not obligatory upon the defendant, it would not be a legal tender. To constitute a valid tender it must be *unconditional*, and must always be of a definite and certain character. *Eastland v. Longshorn*, 1 Nott & M'Cord, 194; *Evans v. Judkins*, 4 Camb. 156; *Husham v. Smith*, 2 Camp. 21.

It becomes, then, important to inquire how far the position assumed is sustained by the facts. The language of the bill upon that subject is this : "That on the 23rd day of March, 1841, within twelve months from said sale, your oratrix, Sophia Bacon, learning, for the first time, that said lot had been sold for taxes, did, on that day, tender to said Margaret Conn, the sum so paid by her, and all charges since her said purchase, if any, and interest at the rate of one hundred per centum per annum, and requested said Margaret Conn to inform her, if she had any other claim for taxes or charges than as thus above stated, and to receive the same, payment of which was then tendered ; and that, upon such receipt, said Margaret Conn would deliver up, cancel, or transfer to said Sophia Bacon, and the other parties interested in said lot, the deed so acquired from the tax-collector, and also give possession of said lot 90, in square 16." The bill goes on to say, that "the said Margaret, not objecting to the amount or form of said tender, but admitting the sufficiency thereof, refused to receive the money, and to comply with the requests aforesaid."

The answer of Mrs. Conn, admits the offer to pay the entire sum that was due to her, but states, that "said offer of Sophia Bacon was coupled with conditions, set forth in said bill, which this respondent could not, and would not, comply with;" she denies, therefore, the legality of the tender; and this is the point for my decision. I can have no doubt, that if the demand of possession of the premises had been made by the complainant as a *condition precedent* to the payment of the tendered money, that it would not have amounted to a legal tender. (*Glascot v. Day*, 5 Esp. N. P. C. 48; *Ryder v. Lord Townsend*, 7 D. & R. 119, cited by defendant's counsel, where it was held, that even the demand of the *receipt*, for the money tendered, vitiated the tender.) But I apprehend it will be found, upon a close examination of the statements of the bill upon that subject, and the admissions of the answer, that the tender, in this case, was a full, adequate, and absolute tender of the money due, trammelled with no condition whatever. That the money offered was in amount equal to the sum due, and that it was offered within the proper period, as limited by statute, are facts not more explicitly stated

than explicitly admitted. The bill states, that on the 23d of March, the complainant tendered the sum due. Had it stopped there, the defendant could have made no objection. The obnoxious qualification would not have existed; but the bill continues, and states, that the complainant *requested* the defendant to disclose whether or not she had any other claims for taxes, and if so to declare them and she would pay them, and that upon their receipt, the defendant would deliver up her tax deed to be cancelled, and would give possession of the lot to those entitled to it. Claiming the latter, by virtue of her supposed right of dower, she refused to deliver the possession, and rejected the tender, because, as she alleges, *the bill states it was made on condition she would transfer the possession*; she did not make this objection at the time, to the complainant, but peremptorily refused to receive the sum offered to her, assigning no reason for it; or, at least, if any was assigned, it does not appear to me, either from the bill or answer, and no proof has been made by either party on the subject of the tender. From the silence of the defendant on that point, the inference is a fair, just, and doubtless true one, that her refusal to receive the tender was unqualified. Had she stated her objection at the time, it might, if it existed at all, have been removed. The object of the complainant seems to have been to free the property from the difficulty occasioned by the tax sale, and her tender was promptly made, as soon as knowledge of the sale reached her, and she would doubtless have relieved it from the alleged obstacle, if the defendant, as in good faith she was bound to have done, had disclosed her objections to the form and wording of the tender, and given the complainant an opportunity to remove them.

The inclination of my mind, and of the authorities, is, that this silence of the defendant, as to objections to the mode of the tender, accompanied with a peremptory refusal to receive the money offered, would forever preclude the defendant from urging at any subsequent period any such objection. It is not necessary, however, for me so to decide in this case. From a careful examination of the allegations of the bill, and an inspection of the guarded denials of the answer, I think it is apparent that the tender in this case was unobjectionable. The supposed conditions were not

Bacon, et al. v. Conn.

attached to the tender, and formed no part of it ; they were mere requests of the most reasonable kind, made after the tender, complete and perfect in itself, had been formally made. The tender and requests were both refused. And the defendant cannot now be permitted to give as a reason for refusing the tender, that which at the time was not a condition attached to it, and the refusal to comply with which was in keeping with the rejection of the money tendered, and naturally grew out of it. I consider this objection to the relief prayed for as invalid, and, unless I find something in the other objection more tenable, I shall make the decree asked.

The bill alleges, that the defendant united with her husband in the deed, to Joseph and others, of the 10th of March, 1836 ; the answer denies the execution of such a deed ; and the one offered in evidence is dated not the 10th, but 13th of March, 1836. The variance is fatal. The deed must be excluded as testimony. If this is a mistake, or oversight of counsel, as I must suppose it to be, and the fact is so shown to me, I shall grant the complainant leave to amend, and insert the true date of the deed. The deed of the 13th of March is properly executed, the relinquishment of dower is in due form, and if the deed alluded to in the bill, with which it in all respects corresponds, except the dates, it completely disproves the denials of the answer, on the subject of the defendant's dower interest in the property. If the mistake in the date of the deed can be agreed upon by counsel, and corrected by their consent, I am prepared to pronounce a decree for the complainant.

It was said in argument, that the complainant's remedy was at law ; this may be true, so far as the recovery of the possession of the property extends ; with reference to the cancellation of the tax deed, however, the case is clearly one for equitable cognizance ; and also for the purpose of having an account with reference to the rents.

DECEMBER TERM, 1843.

BENJAMIN WILLIAMS v. F. L. CLAIBORNE, et al.

Where general language in a deed of marriage settlement is inconsistent, and in conflict with the purposes as defined in the deed, which the parties had in contemplation by the settlement, such general language will be qualified and restricted by the definite recitals of the deed.

In the construction of deeds, the intention to be gathered from the whole instrument must prevail, unless inconsistent with settled rules of law.

W. (in debt) and H. (possessed of large property) being about to marry, by deed of settlement, before the marriage, convey to a trustee for H.'s *sole and separate use, all her property, and the interest, income, and proceeds thereof*, on trust. 1. For the use of W. and H., *for their natural lives*, subject to disposal by H., by will. 2. That H. should have, during her life, full control over the property, and that it should not be subject to W.'s debts or his control. 3. That the trustee might sell when requested; *held*, that W., on the death of H., had no right in the property thus conveyed, or to a participation in the proceeds, income, or profits of it.

W., about to marry H., declares by deed his intention to secure to H. the separate use and disposal of the property conveyed by the deed, and also the income and profits of it; *held*, that W. is estopped by the recitals of the deed, to set up a claim either to the property or the profits thereof.

The complainant's right to a recovery in this case turned entirely upon the construction of the marriage contract between himself and his wife.

The following are such portions of the deed as it is deemed necessary to publish:

"This indenture of three parts, made this tenth day of November, in the year of our Lord one thousand eight hundred and thirty-six, between Benjamin Williams of the county of Madison and State of Mississippi, of the first part; and Jane Hoggatt of the county of Adams, and State aforesaid, of the second part; and F. L. Claiborne of the county of Adams, and State aforesaid, trustee as hereinafter mentioned, of the third part: whereas, a marriage is intended to be had and solemnized between the said Benjamin Williams and the said Jane Hoggatt, and it is their intention to assign and secure to the separate use and disposal of the said Jane Hoggatt, all and every part and portion of her real and personal property, of what kind soever, and thereby not only to make a cer-

Williams v. Claiborne, et al.

tain, liberal, and sure provision for her support and maintenance, but also to secure to her own separate use and disposal all her real and personal property aforesaid ; and whereas, her property, real and personal, does and will consist in such sums of money and other personal property, and of such real property, as she, the said Jane Hoggatt, does now possess, and of such property as she may hereafter obtain by purchase, descent, devise, gift, or otherwise ; and whereas, it is agreed by and between the said Benjamin Williams, and the said Jane Hoggatt his intended wife, that all her said property that she now does possess, or may hereafter in due course of law become entitled to, shall be assigned to the said F. L. Claiborne, trustee as aforesigned, to hold upon such trusts as are hereinafter named, mentioned, and provided respecting the same.

“ Now THIS INDENTURE WITNESSETH, that the said Benjamin Williams, and Jane Hoggatt his intended wife, for and in consideration of the said intended marriage and of the trust hereinafter mentioned, and of five dollars to the said Williams, in hand paid (the receipt of which is acknowledged), have granted, bargained, sold, delivered, and assigned, and do hereby, &c., unto the said party of the third part, all the estate, right, title, interest, claim, and demand whatsoever, of the said Jane Hoggatt, of, in, and to all the lands, tenements, and premises whatsoever, which she may now possess, or hereafter may possess and hold by gift, devise, or descent, or in any manner whatever ; and also all sums of money, goods, chattels, rights, credits, or personal property of any description whatever, which she either now possesses, or to which she may be hereafter entitled in any manner whatsoever ; *to have and to hold, &c.*, upon the following trusts, to wit :

“ *First.* That the said trustee or his successors shall hold the said property, real and personal, to the use, benefit, and behoof of the said Benjamin Williams and Jane Hoggatt, for and during the term of their natural lives, and, after their death, to the use of the heirs of the body of the said Jane Hoggatt, by the said Benjamin Williams to be begotten ; and, in default of such heirs, then to the right heirs of the said Jane Hoggatt ; subject, nevertheless, to such last will and testament of the said Jane Hoggatt, hereinafter provided for and mentioned.

Williams v. Claiborne, et al.

“**Secondly.** And upon the further trust and confidence, that during the lifetime of the said Jane Hoggatt, she shall at all times have the full and complete control of her said property, real and personal, as aforementioned, and that the said Benjamin Williams shall not intermeddle therewith; and that the same or any part thereof shall not be liable to his control, debts, or disposal, and under the control of the said Jane Hoggatt, or of the said trustee, under her direction.

“**Thirdly.** And upon the further trust and confidence, that the said trustee or his successor, &c., shall and will, upon the reasonable request of the said Benjamin Williams and Jane Hoggatt, and at the wish of the said Jane Hoggatt, in writing, under her hand and seal, and duly acknowledged, bargain, sell, &c., unto such person, &c., as the said Benjamin and Jane may appoint, all or any of the said real and personal estate, &c.

“And the said Benjamin Williams, for himself, his heirs, executors, and administrators, doth covenant and agree to and with the said F. L. Claiborne, &c., that the property, real and personal, assigned as aforesaid, and the interest, and income, and proceeds thereof, in all respects whatever, shall be for the sole and separate use, benefit, and disposal of the said Jane Hoggatt, the said marriage notwithstanding; and that the same shall not be subject to the control, direction, or disposition of the said Benjamin Williams, or liable for his debts.”

By the other provisions of the deed, it was stipulated, that Jane Hoggatt might receive and dispose of any part of the property, as she desired, during the coverture, in any manner she might choose: that if she survived her husband, or if a divorce *a vinculo matrimonii*, took place, all the undisposed of effects in the hands of the trustee should “be at her entire, separate, and sole disposal and control”: that she might, by her last will and testament, dispose of all the property, real and personal, with the interest, income, and proceeds, according to her pleasure.

The trustee by the deed accepted the trusts, and covenanted to account “from time to time with the said Benjamin Williams and Jane Hoggatt,” &c., and also not to waste the trust property.

It was further stipulated, in the conclusion of the deed, that if

358 SUPERIOR COURT OF CHANCERY.

Williams v. Claiborne, et al.

the trustee died, resigned, or refused to act, the Probate Court of Adams county should appoint a successor.

All of the other facts necessary for a full understanding of this case are embraced in the Chancellor's opinion.

Hewitt, for the demurrer.

Has the complainant any interest, after the death of Mrs. Williams, in the property embraced in the marriage settlement? What is the rule of construction in such cases? The context is the criterion of interpretation to the intent of the party. 1 Mass. 219; 2 ib. 56; 4 ib. 135; 12 John. Ca. 398.

The deed of settlement recites that it was to secure the estate to the sole and separate use of Mrs. Williams, which must control the construction of the whole deed. 22 vol. Law Lib. 76; 1 Yates, 225.

Jennings, for complainant.

The demurrer must be overruled. The deed creates an *estate tail*, which our statute converts into an estate *in fee simple*, in the first taker. Williams has, accordingly, a vested absolute estate. The Court will not apply the lax rules of construction applying to a *will*, to a deed. 1 Vernon, 343.

The first clause in a *deed*, and the last in a *will*, prevail where there are repugnant clauses. Noy's Maxims, 34; 2 Bl. 182.

The demurrer can only prevail by holding the *first clause void*, as being repugnant. To divest the husband of his *marital rights* over the property of the wife, there must be clear and explicit language indicating such intention. The true construction, in order to make the whole instrument stand, is, that the husband was to take one half and the wife the other.

Winchester, for complainant.

The whole of the property, real and personal, is conveyed to Claiborne, to have and to hold to the use of Benjamin and Jane Williams, for their natural lives, and after their deaths, to the heirs of their bodies.

This creates a *fee tail* in the usee, which, under the statute of Mississippi, immediately executed in them a *fee simple*, in joint-

Williams v. Claiborne, et al.

tenancy. The limitation in default of such heirs of their bodies, to the heirs of Jane Hoggan, is void.

The further trusts are,

1. To secure the wife the full and complete control of her property aforesaid, so that it should not be subject to the debts, disposal, or intermeddling of her husband, but be under her control, or the control of the trustees, subject to her direction.

2. That at the reasonable request of both husband and wife, the trustees should sell and convey all or any portion of said property, to such person, and for such consideration, as they should appoint.

Covenants. — Williams, the husband, covenants with the trustee, that the property assigned as aforesaid, and the interest, income, and proceeds, shall be for the sole and separate use, benefit, and disposal of his wife, and not subject to his control or disposition, nor liable to his debts.

2. Also, covenants with her (a void covenant, as to his interest in the joint tenancy), that she may demand and receive any part of said property or its proceeds, and dispose thereof, as she pleases; and her trustee may deliver or transfer to her any part of said estate or its income, when she may choose to withdraw from said trust, and her receipt shall be a discharge of the trustee. This, like the former, must be limited to her interest in the joint-tenancy; if extended to his interest, it is void.

3. That if she survives her husband, or upon divorce *a vinculo*, she should have the entire and sole disposal and control of such property aforesaid, as shall remain in trustee's hands, and trustee may transfer and deliver the same to her.

Claiborne covenants to perform the trusts, and to account to and with both Williams and his wife, for all receipts, actings, and doings, and to manage for the benefit of all parties concerned in interest.

These covenants show that the former covenants relate only to her interest in the joint-tenancy.

It is a marriage contract, and on good consideration, viz. but for the marriage contract, he would have become owner of all the personal property, upon the marriage.

The construction, therefore, must be in his favor, as it is a contract to divest him of an interest which the law would give.

Williams v. Claiborne, et al.

1. Independent of our statute destroying survivorship, an estate in joint-tenancy being created, and vested in the husband and wife in fee simple, and taking effect upon the marriage, Williams would be entitled to the whole by survivorship. How. and Hutch. 348, sec. 24; 357, sec. 59; Noys's Maxims, 34; Littleton, sec. 665; Co. Litt. 187; 2 Blackstone, 182.

Husband and wife being seized *per tout* only, and not *per my et per tout*, it might be contended, that our statute in relation to survivorship does not apply, and that Williams takes the whole by survivorship. But as that would be inconsistent with the intention of the whole instrument merely to abridge the marital rights of the husband, and give the wife a separate property, we do not contend that the doctrine of survivorship applies.

2. The only construction which can be put upon the whole instrument, so as to effect its general intention, and give effect to all the clauses of the contract, is, that in the joint-tenancy created, the wife has a separate and sole interest in one half the property, which can neither be alienated, controlled, nor the profits received by the husband, or be subjected to his debts; and that, as to the other half, it belonged solely to the husband.

Unless this construction be adopted, some of the clauses of the contract must yield to others, and in that event every clause, subsequent to that which conveys the property for the use of the husband and wife and the heirs of their body, must be controlled by that clause, and if repugnant to it, or so far as repugnant to it, are void. How. and Hutch. 349, sec. 29.

"The conveyance must very clearly indicate that the property is to be for the separate use of the wife, otherwise the marital right attaches"; and "courts of equity will not deprive the husband of his wife's property, to which he is by law entitled, unless the intention be clear that he was not to derive any benefit from it." 5 Vesey, 516; 2 Roper on Property, 163; 4 Desaus. 456; 1 Yates, 432; 22 vol. Law Library, 76; 3 Vesey, 166.

The rules of interpretation of deeds and conveyances are the same in equity as at law. 3 Blackstone, Com. 434; 2 Burrow, 1108.

If there be two clauses in a deed repugnant the one to the other,

Williams v. Claiborne, et al.

the first is to be taken, the last rejected. Shepherd's Touchstone, 85; Bacon's Abridgment, Title *Grant*.

The rule, as extracted from the books generally, and upon principle, is; that the general intention, to be collected from the face of the whole instrument, shall be carried into effect so far as it can be done by reconciling all the clauses to each other, consistent with the interpretation of the law upon each and all the clauses. If clauses are clear and unambiguous, and admit of but one interpretation, and cannot be reconciled with each other, then all conditions, powers, limitations of power, and trusts, repugnant to and inconsistent with the estate created, are so far void as they are repugnant.

Either an estate in fee simple was vested in the husband and wife, as an estate in equity, or an estate for their natural lives, after their deaths remainder to the heirs of their body, as purchasers.

It is immaterial on the demurrer what estate is given him, and the determination of what estate will arise at the hearing. If he has any estate, he has a right to some relief, upon the allegations of the bill and supplemental bill.

As a general rule, courts of equity, in regard to trust estates, adopt the rules of law, which are applicable to legal estates. 4 Paige, 352.

It is said to be a rule in chancery, that if lands are vested in trustees in fee simple, for one and the heirs of his body, with remainder over, the trustees are not to convey in fee simple, but in fee tail. 1 Saunders on Uses and Trusts, 250.

If a statute were passed, like that of New York, converting the estate of *cestui que trusts* into legal estates, this would be construed a fee tail. Shelly's case, in Coke, and Fearne on Remainders.

Montgomery and Boyd, for defendants.

The first general rule of construction, applicable to marriage agreements, &c. is, that the intention of the parties shall prevail, when it can be ascertained by a careful examination of the whole instrument. And all parts of the instrument shall be so construed, that the whole shall stand together, if possible. 3 Cranch, 235;

Williams v. Claiborne, et al.

1 Mass. Rep. 219 ; 2 Mass. R. 56 ; 3 Johns. Rep. 388 ; 4 Mass. R. 135.

It is conceded that Jane Hoggatt took an estate tail in the use according to the first use declared, but it is not perceived what advantage Williams can have from that estate. The same declaration clearly gives him but a life-estate, and that subject to a power of appointment in Jane.

It is not material that the power of appointment is a mere covenant, because covenants, entered into before marriage, will be enforced in equity ; and a covenant to permit an appointment, and to carry into effect such appointment, is sufficient authority to a wife to bequeath her separate estate. 1 Yates, 225, 226.

Where lands are devised for the separate use of the wife, it will be held that the use is not executed. Clancy on Married Women, 256.

CHANCELLOR. In November, 1836, the complainant, Benjamin Williams, being about to consummate a marriage with Jane Hoggatt, they mutually united in a deed of marriage settlement ; in which it is declared to be their "intention" not only to secure to her a liberal and sure support, but also to secure to her the "*separate use and disposal* of all the property, of whatsoever kind, which she then held, or might thereafter acquire, "by purchase, descent, gift, or otherwise." The deed then conveys all her property, of every character, to F. L. Claiborne, in trust : 1. For the use of the complainant and the said Jane, during their natural lives, with a limitation over to the heirs of their body ; subject, however, to be disposed of by her, by last will and testament. 2. That the said Jane was to have full and complete control over the property so conveyed, during her life, and that the same should not be liable to Williams's debts, nor subject to his control or disposal. 3. That the trustee would sell any portion of the property, which the other parties might direct and request. It appears, that the contemplated marriage was consummated the next day after the execution of the deed ; and that, after having lived together a few months, a separation took place. In February, 1838, the complainant filed his original bill, against the trustee in the deed, praying a decree

Williams v. Chaborae, et al.

against him for one half of the annual profits accruing from the estate embraced in the deed. Mrs. Williams died some time afterwards, having disposed of all her separate property by her last will and testament. The complainant then filed a bill of revivor and supplement, making the legatees and executors under the will parties defendant. These new parties, between whom and the complainant the controversy is now exclusively confined, have demurred generally to the bill; and insist, that upon a just construction of the deed of settlement, the complainant has no right whatsoever, either to the property there conveyed, or to the proceeds, rents, or profits thereof. The case must turn upon the construction of the deed. The whole difficulty arises out of the trust first declared, to wit: that the property should be held for the use and benefit of Williams and his wife, during their natural lives. This provision introduces some obscurity, and difficulty of construction; because its terms are not readily reconcilable with those which both precede and follow it. It is impossible to make this provision harmonize with the other portions of the deed, except by limiting and restricting its language, so as to make it conform to the purposes and intentions, which the parties had in view, by the execution of the instrument. What those purposes were is distinctly pointed out by the bill itself, which informs us that the complainant, being in debt, and being about to marry a lady with large estate, he executed the deed in question, in order that her property might not be subjected to the payment of his debts, and that she might hold it for her separate use, and at her separate disposal. But this object could not be accomplished, if, as is now contended, one half the annual income of the estate is reserved to his use; because, to that extent her property would have been subjected to the payment of his debts. The recital in the deed also shows, that the chief object was the relinquishment, on the part of Williams, of all claim to her property, which would otherwise have attached by virtue of the marriage. It is, therefore, in the nature and character of a deed of release. And I understand it to be a settled rule of construction, of deeds of that character, that where there is a particular recital, defining the purposes which the parties have in contemplation, any general language which may follow, inconsis-

Williams v. Claiborne, et al.

ent with the purposes thus declared, will be qualified and restricted by the recital. *Cole v. Gibbs*, 1 Ves. sen. 507; *M'Intyre v. Williamson*, 1 Edw. Ch. R. 33; *Jackson v. Stackhouse*, 1 Cow. R. 112; *Woods v. Nashua Manuf. Co.*; 5 New Hampshire Rep. 467. This latter case extends this rule of construction to deeds of every description. I take it that in this, as in every other description of deed or instrument, the construction must follow the intention to be collected from the whole instrument; and that when thus ascertained, it must prevail over everything else, if it be not inconsistent with settled rules of law. In the case of *M'Guire v. Scully*, 1 Beatty's Rep. 378, it is said that equity exercises a power to medify and control the ordinary sense of language used in marriage articles, so as to give effect to the real intention, according to the context of the articles. But the provision under which Williams claims, is not only inconsistent with the general purpose of the instrument, as disclosed by the recital thereof, and as avowed by the bill, but is equally at variance with the other trusts and covenants, which immediately follow it. The next succeeding trust declares, that she was to have full and complete control over the property thereby conveyed, during her natural life; and that it was not to be liable to the debts of Williams, nor subject to his *control or disposal*. But this provision must entirely fail, if the first is permitted to stand; because, in that event, one half the income and profits of the estate would be both liable to *his debts* and subject to his disposal. If, however, any doubt could arise as to the intention of excluding Williams from any interest in the income or profits of the estate, that doubt is removed by his own explicit covenant in the deed, by which he stipulates, that all her property of every description, "and the interest, income, and proceeds thereof," shall be held for her "sole and separate use, benefit, and disposal," not subject to his "direction, control, or disposition." He then further covenants, that she might, at any time during the coverture, by her simple order, withdraw any portion of the property, real or personal, or the "interest, income, or proceeds thereof," from the hands of the trustee, and dispose of the same at her pleasure. This is utterly inconsistent with the notion of any right in Williams over property, which the wife was thus left free to

hold and dispose of, at her will and pleasure, without his permission or sanction. Here, then, we have the recital in the deed ; the avowal in the bill, and the covenants of Williams, all concurring to show, that the intention upon which the parties treated, concluded, and acted, was to exclude him, not only from any right in the property itself ; but from any participation in the proceeds, income, or profits thereof. Guided by the intention of the parties as thus elicited, I find it impossible to give effect to that part of the deed upon which the bill proceeds, without violating the leading purpose for which the settlement was made ; and a settled rule of construction requires, that the intent of the parties shall, if possible, be carried into effect, rather than the whole instrument should fail. But apart from what appears to be the general intention of the deed, I think that Williams is clearly precluded from setting up any interest under it, upon the principles of an *estoppel*. 1. First, he is estopped by the recital in the deed, which declares its purpose to be, to secure the property to the separate use and disposal of his intended wife. It is clear, that separate property carries with it a separate right to the income and profits thereof. The recitals of a deed are always evidence against the party making them, and he is estopped to deny their truth, or do any other act, inconsistent therewith. 9 Wend. 209.

2. But he is doubly estopped by his covenants, in which he secures to the sole and separate use and benefit of his wife, those very *incomes* and *profits*, which he now seeks to recover. I cannot decree to a party that which, by his express and voluntary covenant, he has renounced all claim to. I am then of opinion, that the demurrer must be sustained, and the bill dismissed, at the costs of the complainant. Let a decree be prepared accordingly.

DECEMBER TERM, 1843.

WHITWELL CRAFT v. CHARLES K. BULLARD.

C. conveyed two negroes to B., by a bill of sale, absolute and unconditional upon its face; *held*, that it was competent for C. to prove by parol, that the bill of sale was intended as a mere mortgage to secure B. a sum of money.

The only relief a court of equity can grant a mortgagor upon his mortgage, is to allow him to redeem his mortgaged property, upon a bill properly shaped for that purpose. C. filed his bill against B., alleging that B. had obtained a judgment at law upon a note, to secure the payment of which, he had conveyed B. two negroes, averring that B. had been in possession of one ever since the sale, and prays for an account of his hire, and of his value, and for an injunction against the judgment at law; *held*, that upon such a bill the injunction could not be retained.

A mortgagor has no right to force the mortgagees to take the property at an assessed value, and cannot call for an account upon any such principle.

A mortgagee, who sells a portion of the mortgaged property, must account for the value of the property sold, and if slaves, for their hire.

THE bill states, that on the 26th day of November, A. D. 1830, the complainant became indebted to the defendant in the sum of nine hundred and seventy-nine dollars; for which he executed two notes, one for four hundred and eighty-three dollars and ninety-eight cents, and the other for four hundred and ninety-five dollars and sixty-five cents. And at the same time he executed to the defendant a bill of sale for two negroes, named Henry and Charles, worth fifteen hundred dollars; which bill of sale, according to the complainant's recollection, expressed, that in case the notes were paid at maturity, the bill of sale was to be cancelled and destroyed, or in case of failure, that the negroes were to be the absolute property of the defendant; that, in accordance with that agreement, he delivered one of the negroes into the possession of the defendant, who has had him ever since, and still has him in possession; that the notes were not paid at maturity, suit was brought upon them, to the fall term of the Circuit Court of Carrington county, for the year 1832, and judgment had thereon in the year 1834, for twelve hundred and seven dollars and eighty-four cents and costs.

The complainant alleged, that he employed counsel to defend the suit at law, who filed pleas to the action, but afterwards with-

Craft v. Bullard.

drew them, informing him that his defence existed in equity ; that being about to prosecute his suit in chancery, the agent and attorney of the defendant proposed to the attorney in the suit at law of the complainant, that if he would pay five hundred dollars of the judgment, and relinquish his equitable defence, they would compromise the suit, and put an end to the litigation ; that this five hundred dollars and the negro boy, were to be taken by the defendant in full satisfaction and payment of the notes and judgment, to which arrangement the complainant assented. That the defendant has had the hire of the negro for twelve years, and that his hire, during that period, was worth fourteen hundred dollars, and that the negro himself was worth one thousand dollars, and that if an account was taken, the defendant would be indebted to him ; that soon after the compromise, to the astonishment of the complainant, execution was issued upon the judgment, which, upon application to the attorney at law of the defendant, was stayed in writing ; that afterwards, still another execution was sued out upon the judgment, which he employed counsel to enjoin, who filed a bill for that purpose, obtained the injunction, but omitted to prosecute the suit, whereby the bill was dismissed ; but that the attorney employed by him falsely informed him that the injunction had been perpetuated.

That he had paid the defendant one hundred and twenty-five dollars, and that some of the articles for which the original notes were given had never been received by him, of the value of twenty-four dollars ; that the bill of sale, above spoken of, was given as a mere security for the notes ; that an execution upon this judgment was now in the hands of the sheriff of Smith county, who was seeking to enforce it : the bill, therefore, prayed, that Bullard might be made a defendant ; that an injunction might be granted, until the bill could be heard ; that an account might be taken of the value of the boy, and of his hire, and the interest thereon ; and of the articles which had never come to hand, for which the original notes were given, and the one hundred and twenty-five dollars ; and that a decree accordingly might be given, perpetuating the injunction, and such other and further or different relief be given, as in equity would be just.

Craft v. Bullard.

Upon this bill, the Chancellor granted an injunction.

The defendant in April, 1843, answered the bill.

He admitted the indebtedness of the complainant to him, as alleged in the bill, but states, that he executed two bills of sale, instead of one; and denies that the two negroes, respectively sold by the separate bills of sales, were worth fifteen hundred dollars; but states, that they were estimated at four hundred dollars each, in the bills of sale; he denies that the bills of sale were conditional, but states, that they were absolute on their face; but admits, that there was a verbal understanding to the effect, charged in the bill; but that the notes were not paid at maturity, and that the verbal agreement "*was of no effect.*" He admits the delivery of one of the negroes to him, which he says, he sold in 1832, for five hundred dollars, for which sale he had to pay his agent, who effected it, \$37·50, whereby he only received \$462·50. He admits the suit at law and judgment, as stated in the bill.

He expresses his ignorance of the compromise set forth in the bill, and denies the authority of his agent to make such, if any was made, and states that he has never ratified it in any way; he denies receiving any hire for the negro he received and sold, and denies his accountability for it. He exhibits an account with his answer of an indebtedness, by the complainant, of one thousand and ninety-five dollars, being the balance due after deducting from the judgment the price obtained for the negro; he admits the payment of the \$125; admits the failure of the \$24 worth of goods, to come to the hands of the complainant; "admits that said bill of sale for said negroes was intended as a security for the payment of said notes at maturity, but charges, that there was a verbal understanding, that, in the event of the payment of said notes at maturity, the said bills of sale should be null and void, otherwise in full force and effect."

The answer further stated, that the complainant and the defendant, on the 18th day of December, 1841, accounted together of all the matters in controversy between them in this suit, and that at that time the complainant admitted he owed the defendant \$1052·50; that he then paid him \$125, and entered into a written agreement, which was filed with the answer, to pay the remaining

Craft v. Bullard.

\$927 in the Bank of Mobile, Alabama, on the first of March, 1842, in default of which, he stipulated to pay the whole amount of the judgment and interest.

The following is the agreement last referred to in the answer.

" State of Mississippi, Smith county.

" This article of agreement, made and entered into, between C. K. Bullard of the first part, and Whitwell Craft of the second, witnesseth, that whereas the said C. K. Bullard holds a judgment, rendered on the 19th day of May, A. D. 1834, for \$1207·84 cents, in the county of Covington, and State aforesaid, in which he agrees to receive nine hundred and twenty-seven dollars, in full discharge for the amount of the plaintiff's money in the above judgment, provided the said Whitwell Craft will deposit to the credit of the said Bullard the above sum of \$927, in the Mobile Bank of Alabama, on the first day of March, 1842, with interest; but in case the said Craft should deposit the above sum on or before the first of February, A. D. 1842, then no interest is to be charged. But if the said Craft should fail to deposit the above sum of \$927, at the time above mentioned, and at the place aforesaid, then he binds and obligates himself to pay the full amount of the above-mentioned judgment, both principal and interest, without further defence or delay of any kind whatever. In witness whereof, we have hereunto set our hands and seals, our seals being a scrawl, this the 18th day of December, 1841.

" Attest.

" Whitwell + Craft. L. s.
his
mark.

" James C. Wakes,

" C. K. Bullard."

" Thomas Williamson."

Upon this state of the pleadings, a motion was made by the defendant to dissolve the injunction.

Adams and Freeman, for the defendant, in behalf of the motion.

This bill is filed to enjoin an execution at law. The bill shows that the complainant had his defence at law, to wit, that the notes levied on were paid in part by the delivery to plaintiff at law of a slave, and also by the services of said negro slave for several years. The record shows that he made his defence below by filing his pleas,

Craft v. Bullard.

and, after a delay of several terms, withdrew the same voluntarily. Under these circumstances, he cannot now be heard in equity. His only reason for coming into this Court is, that his counsel told him that his defence was in equity. The mistakes of counsel cannot give jurisdiction to this Court.

The bill also admits that complainant once enjoined said execution by injunction from this Court, but that the same was dissolved and suit dismissed for want of prosecution. This is also charged to the neglect of counsel.

The answer of defendant is full, and denies all the law and equity of the case. It also shows a written agreement of complainant, entered into after the judgment was obtained to pay the money in controversy. Under these circumstances, and especially after all the aggravating delays shown by the record in this case, the Court can scarcely hesitate to dissolve the injunction.

Mayes and Clifton, for complainant.

The complainant, being indebted to the defendant in upwards of \$900, executed his two notes therefor—the last due 1st November, 1831, and made to him, at the same time, a bill of sale for two negroes, Charles and Henry, and gave him possession of Charles, whom he sold in June, 1832, about seven months after the last note was due.

The defendant, in his answer, admits that there was a verbal agreement, that if said notes were paid at maturity, the bills of sale should be void. It is not necessary to embody a condition like this in the bill of sale, to make it a mortgage. Parol evidence is competent to prove it, much more the admission of the party. *Strong v. Stewart*, 4 Johns. Ch. R. 167.

Wherever it appears to have been the intention of the parties, that the delivery of the property was only a security for the debt, it amounts only to a mortgage. *Reed v. Lansdale*, Hardin, Ky. Rep. 6.

The transaction between these parties equity pronounces to be a mere mortgage, by the complainant, Craft, to the defendant, to secure the debt due.

Is being a mortgage, Bullard had no right to sell the mortgaged

Craft v. Bullard.

property, in any event, without giving notice to Craft to redeem. It is not pretended this was done. The sale of the boy Charles, being unauthorized, Bullard occupies the same attitude as if he still retained him, and the rights of the parties in this controversy will be adjudged precisely as if this were a bill brought by Craft to redeem. In that case, an account of the hire of the negro and the debt due, with interest, would be taken, and if a balance were due to Bullard, Craft would be required to pay it, or the negro would be sold to raise it. If a balance were due to Craft, after allowing hire, the negro would be ordered to be delivered back to him, and the bill of sale cancelled.

A mortgagee in possession is always bound to account for the profits. *Ballengir v. Morley*, 1 Bibb, 195.

The mortgagee, in possession of a slave mortgaged, shall account for the hire. Hardin (*supra*), 6; 3 Bibb, 18. See also 4 Howard, 579; 6 Monroe, 122.

In this case, the defendant, Bullard, having sold the negro without authority, is bound to account for the hire, and for his present value, because, if he had not exceeded his powers by the sale, the negro would be at hand to be delivered up, and the Court will not permit him to take advantage of his own wrong, by giving credit for the price received, and interest.

By examination of the papers, it will be seen that the complainant is an illiterate man — can neither read nor write. The court of chancery is faithful to the impulses of our common nature, by guarding and protecting the rights of such, whenever it can do so without violating established principles. Invoking this benign principle for this case, it is apparent Bullard cannot, conscientiously, claim a dissolution of the injunction, and the collection of this judgment.

The courts say, what is very obvious, that it is often a nice and difficult question, to determine whether a writing is a mortgage or conditional sale, and they have, in all doubtful cases, shown an inclination to treat them as mortgages rather than conditional sales; and, wherever a transaction is infected with usury or oppression, it is consistent with the established rules of evidence to permit proof, that its real character is even different from what it purports to be; and hence it is laid down as a general rule in such cases, that where

Craft v. Bullard.

a conveyance is intended as a security for money, whether this intention appears from the deed itself, or from other circumstances, it is *always* considered in equity as a mortgage, and redeemable, even although there be an *express agreement* of the parties, that it shall not be redeemed, or that the right of redemption shall be confined to a particular time. *Skinner v. Miller*, 5 Lit. R. 86; Butler's Notes to Coke Lit. 205 a; *Edrington v. Harper*, 3 J. J. Marsh. 354. See also *Lewis v. Robards*, 3 Monroe, 409.

It is contended for Craft, that the hire of the negro Charles, and the \$125 cash paid, together, discharge Bullard's debt and interest; and at all events, they, together with the value of the negro, more than do this; and that the agreement to pay, filed by Bullard, with his answer, as exhibit No. 3, was an agreement without consideration, and void; and that no court of chancery, under the facts, and considering the disadvantage the defendant's want of literature subjected him to, would enforce it. We think we have shown enough to induce the Court to refuse the motion to dissolve.

CHANCELLOR. This is a motion to dissolve an injunction staying a judgment at law.

The complainant charges in his bill, and it is distinctly admitted by the defendant in his answer thereto, that the bill of sale from the former to the latter conveying the two slaves, Henry and Charles, although absolute and unconditional upon its face, was, in point of fact, intended as a mere security for the payment of the money for which the judgment at law was obtained. I can have no doubt, therefore, that the transaction between them amounted to nothing more than an ordinary mortgage, and that it was in no sense a conditional sale of the slaves. It is well established, upon both principle and authority, that an absolute deed may be converted into a mortgage, by parol evidence, showing that it was intended as a mere security, and that the grantor will then be let into all the rights and privileges of a mortgagor. Whether the complainant presents himself in such shape as to entitle him to these privileges, is now a proper question for examination; because, if the complainant would not be entitled to relief under his bill, upon final hearing, it is clear the injunction ought not to be retained. The only ground that I

Craft v. Bullard.

can perceive the complainant has for relief in the premises, grows out of his character as *mortgagor*. The only relief, that I am advised of, which this Court can grant a mortgagor against his mortgagee, is that of allowing him to redeem the mortgaged property, upon a bill properly shaped for that purpose. Here the bill states, that one of the slaves was placed in the possession of the defendant, and yet remains there, so far as the complainant is advised ; and then prays, not for a redemption of the slave, but for an account of his hire and of his value, and for a perpetual injunction against the judgment at law. The right of a mortgagor to call the mortgagee to account, is incident to, and, as a general rule, can only arise under, a bill for redemption. *Postlewaite v. Blythe*, 3 Mad. Rep. 242 ; *Goldsmith v. Asburn*, 1 Edw. Ch. Rep. 560. A mortgagor has no right to force the mortgagee to take the property at an assessed value, and cannot call for an account upon any such principle. According to this view of the case, if nothing more had appeared than what is shown by the complainant's bill, I should have discharged the injunction ; but the defendant discloses, by his answer, the fact, that he has since sold the slave that went into his possession, and thus put it out of his power to surrender him : this entitles the complainant to call for the value of the slave, and, I think, cures what would otherwise have been a fatal defect in the structure of the bill. The complainant is clearly entitled to the slave, or his value, as well as an account for his hire, by way of set-off against the payment of the mortgage-money. I give no opinion as to the effect of the subsequent agreement between the parties, as to the mode of settling the difficulty between them. Whether it is to be regarded as fixing the amount to which the complainant is entitled as a credit for the hire and value of the slave, is a question that will properly arise upon taking the account.

Let the motion to dissolve the injunction be overruled.

DECEMBER TERM, 1843.

JOHN FLETCHER v. RACHAEL RAPP.

R. obtained a judgment against F. in Louisiana, by default, and sold a tract of land to F. in discharge of the judgment, and gave a receipt accordingly. Subsequently, R. fraudulently procured the judgment by default in Louisiana to be rendered final; and thereupon brought a record thereof to Mississippi, and sued F., who permitted judgment to go by default, and filed his bill in this Court, alleging as his reason for not defending at law, that the final judgment in Louisiana was *junior* to the date of the receipt; *held*, that the defence of F. was purely legal, and that the reason given for not making the defence at law was insufficient.

Where the plaintiff in a judgment, rendered in a sister State, comes here to enforce it, it is entirely competent for the defendant to show, that the judgment was obtained by fraud.

Fraud vitiates judicial acts, and renders them utterly void.

CHANCELLOR. THIS case was submitted on motion to dissolve the injunction for want of equity on the face of the bill.

The complainant states, that, being indebted to Rachael Rapp in the sum of \$400, she brought suit against him, and recovered judgment by *default*, in the District Court of New Orleans: that he afterwards sold to said Rachael a tract of land, in payment of said judgment, and took her receipt in full against the same: that, long subsequent to this, the defendant fraudulently procured the judgment by default in New Orleans to be confirmed and rendered final; and thereupon brought a record thereof to this State, and sued on the same in the Adams Circuit Court. It appears that to this latter suit, the complainant pleaded *nisi fieri* record payment, and that the judgment in Louisiana was procured by *fraud*; all of which, at a subsequent term, were withdrawn, and judgment by *nisi dicimus* suffered to pass against him; to enjoin which this bill is brought. The bill states, as a reason why no defence was made in the latter suit, that inasmuch as the receipt of the complainant bore date anterior to the confirmation of the judgment in Louisiana, he was advised that it would not be admissible evidence of payment. From anything that occurs to my mind, I am not able to perceive any reason for that conclusion. It is presumed that the receipt pointed directly to the

Fletcher v. Rapp.

debt upon which the judgment by default had been obtained ; and reference to the date of the subsequent confirmation of that judgment would have explained the difficulty as to the date of the receipt, and have shown that such confirmation was taken in fraud of the complainant's rights. Thus it appears to me that the complainant's defence was purely legal, and free from any difficulty or embarrassment. I cannot doubt that where the plaintiff, in a judgment rendered in a sister State, comes here to enforce it, that it is entirely competent for the defendant to show that such judgment was obtained by fraud. Fraud vitiates the most solemn proceedings, and makes them utterly void. Lord Coke says, it vitiates all judicial acts, whether ecclesiastical or temporal. *Fermor's case*, 4 Coke's Rep. 78 b. See also the case of *Borden v. Fitch* (15 John. R. 121), and *Andrews v. Montgomery* (19 John. R. 164), to the same effect. A judgment obtained by fraud would not be enforced by the court where it was rendered, and doubtless any plea which would avoid the judgment there, would avoid it here.

But this is not the only mode in which the complainant might have been relieved. I cannot doubt that if he had applied to the court in Louisiana, showing that after the judgment was taken by default, and before it was rendered final, he had fully paid and satisfied it, that court would have vacated the final judgment, and directed satisfaction to be entered. From any view which I have been able to take of the statements of the bill, I find nothing in it which will authorize me to disturb the judgment at law. I shall accordingly direct the injunction to stand dissolved.

DECEMBER TERM, 1843.

JOHN FLETCHER v. WILLIAM WILSON, et al.

A rescission of a contract, on account of alleged defect of title, will not be granted, where, at the hearing of the case, it is apparent a perfect title may be had, and no fraud is alleged or proved.

A person selling property under a defective claim, afterwards by purchase or descent acquires a perfect title; *held*, that that title will accrue to the benefit of the vendee.

As a general rule, a court of equity will not rescind a contract for mere defect of title, where the vendor has been guilty of no fraud, mistake, or misrepresentation, unless, at the time of the decree, it appears that the vendor is totally unable to make title, and *there is no adequate remedy at law*.

Time is never important in equity, unless made so by the very terms of the contract, or is necessarily so from the very nature of the property, about which the contract is made.

A vendee, discovering a defect in his title, should at once, if he designs doing so at all, surrender the possession of the property, and demand a rescission, and his neglect to do so, is a waiver of his right to a rescission.

A defendant, in his cross-bill against the complainant, cannot introduce new and distinct subjects of litigation from those which are in controversy in the original suit.

A defendant to a bill, having any right in the property in controversy, not noticed in the original bill, may assert that right, by way of cross-bill.

The husband has no power, without the consent of the wife, to convert her real property into personalty, so as to change the course of descent or right of succession.

THE record in this case is very voluminous, and the pleadings complicated. An attempt will be made, however, for the purpose of exhibiting the facts upon which the Chancellor based his opinion, to give a full yet succinct history of the case. To do this, it will not be necessary to abstract in full the various bills, answers, cross-bills, amended bills, and exhibits, which constitute the case, and have swelled the record to its present size. Such portions only will be presented as bear upon the merits of the controversy.

William Wilson, and Joseph Conn, in January, 1836, sold a lot in the city of Natchez, to the complainant, John Fletcher: who paid them two thousand dollars in cash, which was divided equally between them, and executed his two notes, for two thousand dollars each, payable one and two years after date to Wilson and Conn, or either of them. Wilson, as heir-at-law of his deceased brother, derived title to the lot; Conn's wife was a sister of Wilson,

and, together with Wilson, constituted the only heirs of their brother, and in them was vested the full legal title to the lot : upon the sale to the complainant, Wilson and Conn executed a joint deed to him, which was put upon record in the proper office, and the complainant immediately executed to them a mortgage upon the lots, to secure the purchase-money yet due. The deed by Wilson and Conn to the complainant, was redelivered to them by the complainant, to take to the county of Yazoo, to obtain Mrs. Wilson's relinquishment of dower, and to the county of Attala to obtain Mrs. Conn's conveyance of her right in the property. The complainant was immediately put in possession of the property, and remained in possession undisturbed.

This relinquishment of the wives, and return of the deed, was to be effected in a reasonable time.

In February, 1839, Wilson and Conn sued Fletcher in the Adams Circuit Court, upon the two notes for \$2000 each ; Fletcher, in June, 1840, enjoined the suit, upon the ground of defect in the title, in the neglect of the wives of Conn and Wilson, to relinquish their respective rights in the property. He states in his bill, that he had lost several opportunities of sale for want of title, and prays for a specific performance, and damages for their injuries sustained by the delay, or for a rescission of the contract and compensation.

Wilson and Conn both answered, and made their answers cross-bills.

Wilson disclosed the death of Mrs. Conn, his sister, and the descent of her interest in the land to him, and stated that Mrs. Conn had refused to convey her right at all in her lifetime to Fletcher, and had never done so ; but that Mrs. Wilson had united with him and Conn in the deed, and he had sent it back to Fletcher, who had refused to receive it. That the whole title to the lot was then in him, and passed by the deed he had already executed (and which he exhibited with his answer, and tendered it to the complainant) ; and if not, he was willing and ready to make a perfect title to the property, and denied that Fletcher had lost any sale of the land for want of title. In his cross-bill, he set up the mortgage ; claimed that the notes payable to Wilson and Conn, by the death of his

Fletcher v. Wilson, et al.

sister, had become his own, and that Conn had no longer any interest in them, and prayed a foreclosure of the mortgage. To this cross-bill, Conn and Fletcher were made defendants.

Conn's answer to the original bill on the subject of the sale, the death of Mrs. Conn, and her refusal to join in the deed, are in substance the same with Wilson's; in his cross-bill, he states a great deal of irrelevant matter, the substance of it, however, being the assertion of his right to one half the purchase-money of the lot, and a prayer that Wilson might be enjoined from settling with Fletcher for it.

Wilson answered this cross-bill of Conn's, and denied his right to any part of the money, and Conn, on the 26th of December, 1842, dismissed his cross-bill.

On the 1st of March, 1842, the complainant filed an amended bill, alleging, that, at the time of exhibiting his original bill, he was wholly ignorant of the refusal of Conn's wife to execute the deed to the lot; that he was, by the original deed, only clothed with Conn's life estate in one half the lot; that, in consequence of this defect, the lot is not as valuable as it would be if the title were perfect; and he prays, therefore, for a rescission of the contract, and that he may be repaid the sum he had already advanced, and be reimbursed for his improvements.

Wilson answered this amended bill, denies the allegations of ignorance of Mrs. Conn's refusal to unite in the deed, and refers to the exhibits to the original bill of the complainant, of the letters of Conn to Fletcher, in which Conn informs Fletcher, that his wife, Mrs. Conn, *bitterly* refused to relinquish her interest.

Upon Wilson's cross-bill, a *pro confesso* was taken in open court, on the 26th February, 1842, against Fletcher and Conn.

The proceedings in the case as to Enos Fletcher and Isaac Stebbins, which have only added to the prolixity and perplexity of the record, are not noticed.

Montgomery and Boyd, for complainant.

John Battaille, for defendant, Wilson.

It is contended on the part of Wilson, that the contract of ~~sale~~ must be confirmed: that Fletcher got possession of the house

Fletcher v. Wilson, et al.

and lot, and has all along had possession from 1836, down to the present time, is admitted by his original and amended bills, and appears from the proofs in the cause. It is admitted, also, that he took a deed with full covenants from Wilson and Conn, and the deed itself proves it. It is not alleged, that there ever has been any eviction, or even that it is threatened ; nor that Wilson or Conn are insolvent. Wilson has acted in good faith, throughout, and done all that he could to perform the contract, and, it is insisted, has performed it in a reasonable time, considering the unforeseen and unavoidable circumstances and obstacles which have presented themselves, and which he neither foresaw, nor had any hand in occasioning, and could not prevent. It is true, there was some delay in making the title, but that was not caused by the defendant, Wilson. He did all that he could to complete the title by executing and acknowledging with Conn the deed, which was approved by Fletcher, and procuring his wife to do the same, and relinquish her right of dower : and there was only a delay of a few months between the time of his signing it, and that of his wife's acknowledgment ; which delay was occasioned by the refusal of Mrs. Conn to convey her interest, and ineffectual endeavors to persuade her. There was not any fraud, misrepresentation, or deception practised by Wilson or Fletcher. The misrepresentation, if any, to Fletcher, was on the part of Conn, in representing that his wife was willing to sell her interest. But it is clear that Fletcher, at the time of sale, knew that the right to one half of said house and lot was in Mrs. Conn, and that Conn had not any right to sell her interest. He therefore cannot complain that he was deceived. The title-deed was executed by Conn and Wilson and wife, in 1836, and recorded as to Wilson and Conn ; the suits in Adams Circuit Court, on the notes, for the purchase-money, were instituted in February, 1839. Mrs. Conn died in March, 1838, and Fletcher only filed his bill in June, 1840. The legal title to said house and lot devolved on Wilson alone, on the death of Mrs. Conn, his sister ; that is, to the half interest which had belonged to his sister. The depositions of Alexander Jourdan, John Ross, James Foster, and Robert Alexander, prove clearly that Wilson and his sister, Mrs. Conn, were the only legal heirs of Patrick

Fletcher v. Wilson, et al.

Wilson, deceased, the former owner of the property ; that Mrs. Conn died, without ever having had a child by said Conn, and without leaving any children, or making a will, or having in her lifetime conveyed her interest in said property to any one : and that defendant, Wilson, her brother, is her only heir, which is admitted by Fletcher's answer to Wilson's cross-bill. The pedigree and heirship of the defendant, Wilson, is proved to the exclusion of every reasonable doubt by the best evidence, as appears from the depositions themselves, which the nature of the case will admit of. The evidence on this point is sufficient, according to the strict rule of legal evidence in such cases. 1 Starkie's Ev. 29 (edition, 2 vols. in 1) ; 2 Stark. Ev. 603-615 ; 13 Eng. Com. Law R. 426 ; 15 J. R. 226, 227 ; 1 Harr. and J. 356. It being established, that Wilson and his sister, Mrs. Conn, were, at the time of said sale, the only heirs-at-law of said Patrick Wilson ; and on the death of Mrs. Conn, her brother, the defendant, Wilson, having her interest, it follows, that if Wilson had not the full legal title at the time of executing said deed to Fletcher, together with said Conn, and Wilson and wife : he possessed the remaining legal interest in said house and lot, on the death of Mrs. Conn ; and the deed which himself and wife, and said Conn, had executed to Fletcher, being a joint deed, with full covenants of warranty. 2 Edw. R. 37 a., the after-acquired interest, which he beired from Mrs. Conn, enured to the benefit of said Fletcher. See 5 Paiges, R. 300, on this point. So that Fletcher had a perfect legal title before suit was brought for the balance of the purchase-money, due by said two promissory notes ; and two years before, Fletcher filed his original bill for a specific performance or rescission of the contract, for the prayer of his bill was in the alternative. If this view of the case be correct, and it certainly is sustained by the proofs in the cause, Fletcher has no equity on which to found his bill, and no claim to the interference of this Honorable Court. But perhaps he will pretend, that he did not know that his title was perfect, when he filed his bill. To this we answer, he ought to have known it, before he swore to his bill. Wilson swears, positively, that he sent an agent to Natchez for the express purpose of tendering said title-deed to said Fletcher ; who returned, and reported that he had tendered

Fletcher v. Wilson, et al.

the same to Fletcher, who refused it, and the deed is now filed as an exhibit. It is true, Fletcher swears that no tender was made of a title-deed. But the principle is well settled, that more credit is due to affirmative and positive testimony, than negative. "Where a vendor has proceeded to make out his title, and has not been guilty of gross negligence, equity will assist him, although the title was not deduced at the time appointed; and the time will be considered as waived, where a purchaser permits a long time to elapse." 1 Sugd. on Ven. (new ed.) p. 500, 501; 1 Wheat. 179—196; 5 Cranch, 262; 2 Dese. 583. Fletcher did not file his bill for a specific performance, or a rescission of the contract, until June, 1840, more than four years after the title, as he says, was to have been made. And then only, as is most probable, to stay the suit or judgment therein in Adams Circuit Court for the purchase-money, and to delay the payment of the same. "A contract ought never to be rescinded, except in cases of fraud, or plain and palpable mistake." 3 Ran. 504, and authorities there cited. "A court of equity will refuse to rescind a contract, in many cases, where it would also refuse to decree a specific performance." 3 Ran. 504, and authorities there cited. *Mortlock v. Buller*, 10 Ves. 306. "The vendor may perfect the title at any time before final decree." 1 Sug. on Ven. (new ed.) p. 502, 503, 264, 265, 266; 6 Madd. 366, 256; 7 Ves. jun. 202; 1 Madd. 348; 2 P. Wms. 629; 6 Ves. jun. 646; 7 Id. 265; *Clute v. Robinson*, 2 J. R. 597; 5 Paige, R. 235. The decreeing a specific performance is a matter of discretion. 1 Sugd. on Ven. (new ed. 2 vols. in 1) 245; 6 J. C. R. 111, 222; 4 Wheat. 465.

A court of equity will frequently decree a specific performance, where the terms of the agreement have not been strictly performed on the part of the person seeking specific performance. 1 Sug. on Ven. (new edition, 2 vols in 1) 246, 257, and authorities there cited. And it has been decreed against an heir, on the contract of his ancestor, who died before he completed it. 1 Sug. on Ven. (new edition, 2 vols in 1) 257; and if against an heir, why not for an heir? Where a party fails in performing the contract, the other, if he means to rescind, should give a clear notice of his intention. 1 Sug. on Ven. 261; 6 Maddox, 18. But here was

Fletcher v. Wilson, et al.

an acquiescence of more than four years. 1 J. C. R. 370; 1 Dev. & Bat. E. 279. And then a bill filed in the alternative, for performance or rescission. A rescission at this late day would be greatly inconvenient to Wilson. Fletcher gets the title he bought, a fee-simple title, to the whole property. From every view of the case, the counsel for Wilson is of opinion, that the contract of sale ought not to be rescinded. A substantial performance as to title, is all that is requisite. 6 Paige, R. 407, 412; 6 J. C. R. 38; Sug. 352, 299; 1 J. C. R. 356. Though the original bill of Fletcher prays a performance or a rescission, counsel for Wilson is at a loss to determine, whether Fletcher now means to insist upon a performance, or a rescission. But as in his amended bill he prays, that "said contract of sale, for the purchase of said house and lot, may be altogether rescinded and set aside," counsel of Wilson must conclude that rescission is insisted on.

The only question in this cause, of real difficulty, if indeed his Honor the Chancellor shall find any difficulty even in that, is, that with regard to the claim Fletcher sets up, and also insists upon, of damages for the advantage of his bargain, which he says he measurably lost in not being able to sell the property at a considerable advance on the purchase-money, by reason of the delay in making the title. But if a rescission of the contract is now, as it undoubtedly is, the relief asked by Fletcher, in his amended prayer, and insisted on by him, or if the Court should decree a rescission, in either case, it is contended, on the part of Wilson, that this Court will not decree damages, or direct an issue of *quantum damnicatus*. Fletcher, it would seem, insists upon rescission and damages, or damages solely; and this Court cannot grant either the one relief or the other. "Compensation or damages ought, therefore, to be decreed in equity, only as incidental to other relief sought by the bill, and granted by the court; or where there is no adequate relief at law, or where some peculiar equity intervenes."² 2 Story's Eq. 104, 105, 106; 4 J. C. R. 560; 2 Robinson's (Va.) Pr. 187, 188, 189.

"Courts of equity ought not to entertain bills for compensation, or damages, except as incidental to other relief; where the contract is of such a nature, that an adequate remedy lies at law for such compensation or damages. 2 Story's Eq. 107.

"In the present state of the authorities, involving as they certainly do, some conflict of opinion, it is not possible to affirm more, than that the jurisdiction for compensation or damages does not ordinarily attach in equity, except as ancillary to a specific performance, as to some other relief." 2 Story's Eq. 108, 109. "If it does attach in any other cases, it must be under very special circumstances, and upon peculiar equities; as, for instance, in cases of fraud; or in cases, where the party has disabled himself by matters, *ex post facto*, from a specific performance; or in cases, where there is adequate remedy at law." Id. 109.

"As a general rule, a purchaser is not entitled to any compensation for the fancied goodness of his bargain, which he may suppose he has lost." 1 Sug. 252, 253; 1 Wheat. 179; 5 Cranch, 262; 1 Dess. 382; 2 Bibb, 434; 3 Bibb, 317; 2 Call, 421; 1 Peters, C. C. R. 85; Dudley's R. 133.

From the above authorities, it is certain that a rescission and damages, or damages alone, without specific performance, cannot be decreed. Nor from the authorities last cited, can Fletcher obtain a decree from this Court for damages, in consequence of his being unable to sell the property at an advance, because of the delay in making the title, or for the fancied goodness of his bargain, which he may suppose he has lost. But it is denied in Wilson's answer, that he was prevented from selling at an advance, and shown that he did sell to Enos Fletcher for \$10,000.

Nor can he, in this case, have a decree for damages, for the mere delay in making title, even though the Court should decree that which is contrary to what he seeks, a specific performance; because he has a remedy at law upon the covenants in the deed executed and delivered by Wilson and Conn to him; and, unless he obtains a rescission of the contract, he can resort to those covenants. It is difficult to conceive how a party, coming into a court of equity, and praying for the rescission of a contract, can, on equitable principles, ask of a court of equity damages alleged to have been occasioned by the non-fulfilment of that contract, or for improvements, &c., under the circumstances of this case, which non-fulfilment is the consequence of his own act.

"It may be stated, as a general proposition, that for breaches

Fletcher v. Wilson, et al.

of contract, and other wrongs and injuries, cognizable at law, courts of equity do not entertain jurisdiction, to give redress by way of compensation or damages, where they constitute the sole objects of the bill. For, whenever the matter of the bill is merely for damages, and there is a perfect remedy therefor at law, it is far better that they should be ascertained by a jury, than by the conscience of the equity judge. And, indeed, the just foundation of equitable jurisdiction fails in all such cases, as there is a plain, complete, and adequate remedy at law." 2 Story's Eq. 104.

A court of equity can give damages in no case where the party has a clear remedy at law. 6 Ran. 658; 3 Ran. 238.

And because the damages for the mere delay in this case cannot be estimated; for Fletcher has had the undisturbed possession and enjoyment of the property. He knew at the time of the sale that Conn had no title to the property, and that he had no right to contract with Conn for the sale of Mrs. Conn's real estate. Wilson has done nothing *ex post facto*, to disable himself from the making a specific performance; and there has been no damage suffered or done. The above consideration of this question is surely correct; even if it be considered that Fletcher seeks a specific performance. For there can be no compensation or damages, unless there be some violation of the terms of the contract, or inability to perform, either of which is a breach of contract, and consequently a prayer for a specific performance is inconsistent with such breach. But it has been decided, that "a bill in any form, claiming damages for breach of contract, cannot be entertained in equity." 3 Leigh's R. (Va.) 667.

Fletcher, in his amended bill, prays for compensation for improvements, if his prayer for rescission should be granted. For Wilson it is contended, that should such a decree be made, Fletcher is certainly not entitled to an allowance for improvements, as against Wilson; the doctrine of allowance for improvements, is, that if a party, purchaser, or possessor, *bond fide*, through mistake or fraudulent misrepresentation, believes he has, or has good reason to expect he will have, a good title to premises, and under such belief makes improvements, upon being deprived of possession, a court of equity will decree him an allowance for improvements made under such

mistaken impression. But here is no allegation or proof of mistake or fraudulent misrepresentation as to Wilson, nor indeed as to Conn; for the facts of the case show beyond a doubt, nor is it denied, that Fletcher knew, at the time of sale, that Mrs. Conn held in her own right a moiety interest in the property, and that she could not be divested of her rights, without her own free will and consent. Under the circumstances, therefore, Fletcher made the improvements at his own risk. For the doctrine of improvements, as recognized by courts of equity, see 1 Story's Eq. p. 378, 379; 6 Paige, 390, 403, 404, 405. And, moreover, the improvements will be amply compensated by the rents and enjoyment of the property for now upwards seven years.

No objection is made by Fletcher to Wilson's making a part of his answer a cross-bill for the purposes therein set forth, and in reference to the subject-matter of the original bill; and no doubt is entertained by Wilson's solicitor, as to the propriety of the Court's entertaining such a bill. To remove all doubt, however, reference is made to the act of 1838, H. & H.'s Dig. 524, 525, which says, that "Hereafter any defendant or defendants, in any chancery suit, may introduce any new matter material to his, her, or their defence, and call on the complainants to answer," &c.; "and any defendant or defendants may, if he, she, or they choose, make his, her, or their answer or cross-bill against the complainants," &c.; "and like proceeding shall be had thereon as on other bills," &c.

It is well settled, that "where, upon a bill brought by the vendor against the vendee for a specific performance of the contract, and for a payment of the purchase-money, if the decree is for a specific performance, equity will decree the payment of the purchase-money also, as incidental to the general relief, and to prevent a multiplicity of suits, although the vendor might, in many cases, have a good remedy at law for the purchase-money." 2 Story's Eq. 106, and authorities there cited. See also 5 Peters's R. 269, and 5 Paige's R. 235 - 240, which are much stronger.

When a decree is made for a specific performance, the Court will decree payment of the purchase-money, and a sale of the premises by the Master, to raise the purchase-money, if the vendee refuses to pay it. *Clarke v. Hall*, 7 Paige, 382, 385.

Fletcher v. Wilson, et al.

"A cross-bill is usually brought, either to obtain a necessary discovery of facts in aid of the defence to the original bill, or to obtain full relief to all parties touching the matters of the original bill." Story's Eq. Pl. p. 311, sec. 3 and 9.

As to cases in which cross-bill may be filed for relief in the premises, in behalf of defendant, Story's Eq. Pl. 213, sec. 391; p. 314, sec. 394; p. 317, sec. 398, 399; 6 Paige, 288; 2 J.C. R. 355; 7 J. C. R. 250.

"The Court will sometimes, at the hearing, and in its discretion, direct a cross-bill; but this is when it appears that the suit is sufficient to bring before the Court the rights of all the parties, and the matters necessary to a full and just determination of the cause." 7 J. C. R. 250, 253; Mitford's Pl. 77. A cross-bill "is treated, in short, as a mere auxiliary suit; or as a dependency upon the original suit." Story's Pl. p. 318.

If, in decreeing a specific performance, a court of equity would also — in order to grant full relief, do full justice between parties, and prevent multiplicity of suits and circuity of action — go further, and decree the payment of the purchase-money, the vendor would have a lien on the property for the purchase-money, which would be enforced by the court. Is it, therefore, going any further to foreclose the mortgage given for the purchase-money; which is, in other words, nothing more than decreeing the payment of the purchase-money, and enforcing its lien on the property? The foreclosing said mortgage, it cannot be denied, is necessary to obtain full relief to all parties touching the matters of the original bill, and to a full and just determination of the cause. Fletcher claims damages for the profitable speculation he had lost by reason of the delay in making title, and a money decree is sought against Wilson; and would it be thought that Fletcher should have a decree for damages against Wilson, and Wilson no decree for the purchase-money; or, that after the termination of this case, the suit for the purchase-money at law being enjoined, that Wilson should be left to commence a new action for the purchase-money? This would be intolerably harassing and oppressive.

About Wilson's right to the whole of the purchase-money, there can be no doubt: he is the sole heir of Mrs. Conn. Mrs. Conn

never authorized Conn to sell, nor sold or conveyed her interest in the house and lot : if she had have conveyed, she would have been entitled to the purchase-money, and this Court would have protected it from her husband for her. Conn had no right to sell her interest ; and, surely, the \$1000, part of the cash payment of the purchase-money, was ample compensation to him for any interest he could have had : he never had any title to the property, except in right of his wife during her life. It is clearly proved, that he and she never had issue of their bodies ; and of course, on her death, he could have no right to or interest in the real estate of which she died seised : and all her right devolved on her brother, the defendant Wilson, on her death. As to the agreement which Conn alleges, in his cross-bill, to have been entered into by Wilson with him, there is no proof of it : it is flatly denied by Wilson, in his answer to the cross-bill ; and, even if such agreement were entered into by Wilson — to divide the balance of the purchase-money with Conn — it was not sanctioned by Mrs. Conn ; was without any consideration, and would have been a mere *nude pact*, and therefore would not be binding on Wilson, either in law or equity. Furthermore, Mrs. Conn was then living : her interest in said house and lot had not then devolved on Wilson. How could Wilson, therefore, contract, except as to his half interest ? Wilson divided with Conn the \$2000 cash payment, giving him \$1000, which Conn admits. This Wilson was induced to do, from a belief founded on Conn's representations alone, that his sister was willing to sell her interest, and as her portion of the cash payment : even it might be recovered back, for Conn had no right to receive it. But the *pro confesso* decree, taken in open court against Conn, who was made a defendant to Wilson's cross-bill, is conclusive, as to Conn's rights or claim ; and his dismissal of his cross-bill puts beyond controversy all question as to his rights.

There is nothing in the depositions taken by Fletcher material to the cause, or affecting its merits.

CHANCELLOR. In January, 1836, the complainant purchased from the defendants, Wilson and Conn, a house and lot in the city of Natchez, for which a deed was then executed, and acknowledged,

Fletcher v. Wilson, et al.

and recorded, and then taken by the defendants, under a promise to procure the signatures and acknowledgment of their respective wives to said deed, and return it to the complainant. The complainant, at the same time, reconveyed the same lot to the defendants, by way of mortgage, to secure a balance of the purchase-money, falling due thereafter. In February, 1839, suit was brought at law for the recovery of the purchase-money. In November, 1840, the complainant filed his original bill, enjoining the suits at law, alleging the failure of the defendants to procure the signatures of their wives and return the deed, although four years had elapsed from the time of their promise to do so ; and praying for either a specific performance of the contract, and for damages on account of the delay, or for a rescission thereof, and for compensation for money expended in repairs. The answer of Wilson shows, that the title to the house and lot descended to himself and his sister (Mrs. Conn) as the heirs of Patrick Wilson ; that Conn had no interest in it, except in right of his wife ; and that the delay to complete the deed arose from her refusal to join in the conveyance ; that she died in 1838, leaving him her sole heir, and that he thus became invested with the entire title to the lot, and tenders a deed thereto from himself and wife ; and then, by way of cross-bill, insists upon a foreclosure of the mortgage given by the complainant, alleging that, by the death of Mrs. Conn, he became exclusively entitled to the mortgage-money. The complainant then filed an amended bill ; and, upon the facts disclosed in the answer, insists upon an absolute rescission of the contract.

From this, and the argument of his counsel, I am led to suppose that the case, on the original and amended bill, is now to be treated as going exclusively for a rescission of the contract, as this is the only point of view in which the counsel have presented it to my consideration. The question is, — Can a rescission be had for defect of title, where no fraud is alleged or proved, and where it is apparent that a perfect title may now be had ? I think that the complainant's title became complete and perfect upon the death of Mrs. Conn, through the operation of the previously executed and delivered deed of Wilson. The title cast upon him by the death of his sister, enured to the benefit of the complainant. No principle is

Fletcher v. Wilson, et al.

better settled or more consonant to reason, than that where a person sells property under a defective claim, and afterwards, by purchase or descent, becomes clothed with a perfect title, that title will enure to the benefit of his vendee. But even if the title of the complainant was not perfected in this way, still, if the defendants are now ready to perfect it, he cannot, I apprehend, have a rescission on account of any delay to do so. As a general rule, a court of equity will not rescind a contract for mere defect of title, where there is no fraud, mistake, or misrepresentation by the vendor. *Thompson v. Jackson*, 3 Rand. R. 504. It is true, that if, at the time of the decree, there is a total inability on the part of the vendor to make title, and there is no adequate remedy at law for the breach of the contract, there the Court will decree a rescission, even though there may have been no actual fraud in the case. *Bullock v. Bemis*, 1 A. K. Marshall's Rep. 434; *Hepburn v. Dunlop*, 1 Wheat. 179. This, I apprehend, is the extent of the exception to the rule. But my researches have furnished me with no case, where a rescission has been decreed merely on account of defect of title, where the vendor showed himself ready and willing to perfect the title at or before the hearing, unless time had been made important by the terms of the contract, or was necessarily made so from the very nature of the property. Subject to these exceptions, time is not considered important, in a court of equity; and even a specific performance will be decreed, where there is no fraud, and the vendor is ready to make a good title at the hearing. *Hepburn v. Auld*, 5 Cranch, 262; 3 Cow. Rep. 445; *Finley v. Lynch*, 2 Bibb, 561; 1 Marshall's Rep. 423; 3 Bibb, 366. And yet it is well settled, that a court of equity requires much stronger grounds for rescinding an agreement, than would induce it to refuse specific performance. *Seymour v. Delaney*, 3 Cow. Rep. 445. I think, moreover, that it is evident from the reference, in the original deed to the complainant, to the source of the defendant's title, that he must have known that the title to one moiety of the lot was in Mrs. Conn, and not in her husband; if so, he must be regarded as having purchased with a full knowledge of the alleged defect of title, and, upon well settled principles, could have no relief on that ground. But, however that may be, it is quite clear from the letters of Conn,

Fletcher v. Wilson, et al.

exhibited with the bill, and from the deposition of E. Fletcher, that the complainant knew, as early as 1837, of Mrs. Conn's refusal to join in the conveyance of the lot. Upon receiving this notice, he might, if he had so elected, have insisted that the agreement was at an end; and by giving notice to that effect, and surrendering the possession, he might have discharged himself from the contract. But if such was his intention, he should have taken the step promptly, and upon the first information of the inability or refusal of his vendors to make him a perfect title; and his neglect to do so, amounts to a waiver of his right to call for a rescission. 1 Sug. Vend. 261; 6 Madd. Rep. 18; *Lawrence v. Dale*, 3 John. Ch. 23; *M'Neven v. Livingston*, 17 John. R. 437. He does not appear, however, to have entertained or given notice of any such purpose, until pressed by suit for the payment of the purchase-money; and even then, he only asked for a rescission of the contract, as an alternative to a failure to get a specific performance. It was not until March, 1842, when he filed his amended bill, that a rescission was exclusively insisted on. And it is evident from the facts in the case, that he either then had the title by the death of Mrs. Conn, and through the deed of Wilson, or at least that a good title could then be had. All this the complainant then knew, because he admits, in his answer to the cross-bill, that Mrs. Conn, in whom a title to a moiety of the lot vested, was then dead, and that Wilson is her sole heir. During all this time, the complainant appears to have had the undisturbed possession and enjoyment of the house and lot. And I understand the rule to be, that time is not generally considered essential in such cases, where the vendee continues in possession, enjoying the premises as fully as though his title were perfect.

In the case of *Roach v. Rutherford*, 4 Desaus. Rep. 261, the Court refused to set aside a contract for the purchase of a house and lot, on the allegation of defective title, after a long possession by the purchaser, connected with other acts, amounting to a waiver of the delay to complete title. And in the case of *Craig v. Martin*, 3 J. J. Marsh. Rep. 54, the Court decreed a specific performance of the contract against the vendee, he having been admitted to possession, and the delay of the vendor to complete the contract

Fletcher v. Wilson, et al.

having arisen from the peculiar state of the title, without any positive fault on his part. The Court held, that as the vendee had possession, time, in completing the contract, was not important. I am hence of the opinion that the contract should not be rescinded, and shall, accordingly, direct the original and amended bill to be dismissed, unless the complainant now claims a specific performance, under the prayer of the original bill ; if so, a decree to that effect will be ordered.

I come now to consider the case of the cross-bill of Wilson, for the foreclosure of the mortgage. To this it is objected, 1. That it introduces new matter. 2. * That Conn, or his assignee, should be made parties thereto, being entitled, as it is said, to a part of the money due on the mortgage.

1. It is true that a party cannot, by his cross-bill, introduce new and distinct subjects of litigation from those which are in controversy in the original suit. To illustrate the rule : — A defendant cannot, by a cross-bill, bring into litigation with the complainant other property than that referred to in the original bill, about which they may have some conflicting claims. *Gulletian v. Erwin, et al.*, 1 Hopk. Ch. Rep. 48.

But I take it, if the defendant has a claim upon property which is the subject of the original bill, he may always assert such claim affirmatively against the complainant, by way of cross-bill. Thus ; to a bill for the specific performance of a written contract, the defendant may oppose a cross-bill, for the purpose of having the contract cancelled or delivered up. Story's Eq. Pl. 312, sec. 391. So it seems, that upon a bill by one of two tenants in common for partition, the other may set up, by way of cross-bill, that he holds the equitable title to the whole premises, and pray that the legal title in the complainant may be decreed to him. Story's Eq. Pl. 313 ; *German v. Mackin*, 6 Paige's Rep. 288.

2. In relation to the second objection, it is too plain for argument, that Conn's contract to sell his wife's interest in the lot, neither divested her title, nor changed the nature of the property. The

*The counsel for Fletcher fell into an error, as to Conn's not being a party to Wilson's cross-bill, and have thereby misled the Court. An examination of the record shows that he was a party defendant.

Fletcher v. Wilson, et al.

husband has no power, without the consent of the wife, to convert her real property into personality, so as to change the course of descent, or right of succession. If the wife had joined in the sale of the lot, this would have been a conversion of the property, and would have entitled the husband, or his assignee, to the mortgage-money, in exclusion of the heir-at-law of the wife. *Rogers v. Patterson*, 4 Paige, Rep. 409. But the wife did not join in the deed, and her death having cast the entire title to the lot on the defendant, Wilson, as her heir-at-law, and he having ratified the sale, he of course became entitled to the whole mortgage-money, as an incident of that sale. I conclude, therefore, that Wilson is the only necessary and proper party to the bill for a foreclosure of the mortgage, and that such foreclosure may be properly had upon the cross-bill. Let the case be referred, to ascertain the amount due, and, upon the coming in of the report, a decree of foreclosure and sale may be had. Wilson and Conn will be decreed to pay the costs of both suits.

DECEMBER TERM, 1843.

W. B. YOUNG v. ROWLAND SUGGS, *et al.*

A bill filed by a distributee of his father's estate, against the administrator thereof, *dismissed*, upon answer of the administrator and proof, that he had paid over to the regularly appointed guardian of the complainant, his entire distributive portion.

THE bill, filed 16 January, 1838, states, that complainant is the only legitimate surviving child of the marriage of William Young and Elizabeth, now the wife of defendant Suggs, they living separate. Complainant's father died intestate, in Alabama, in 1816, leaving property. Suggs administered, giving bond in \$1000, William Barton surety ; personal property ordered to be sold, and appraisers appointed, as shown by exhibit B. Barton removed to Texas, eight or nine years ago, Suggs to Mississippi, about sixteen years ago. Suggs married complainant's mother about 1817, or 1818, and soon after removed to Mississippi ; separation took place ; Suggs failed to comply with his bond, and at sale of property, bought nearly all of it himself, sale amounting to \$1263. For this "iniquitous proceeding," Barton "challenged" Suggs to surrender to him at least part of the property he had bought, and the property was surrendered to Barton accordingly. Complainant has often, since the age of twenty-one, demanded his share of his father's estate from Suggs, and it was refused. Prays for full discovery, for an account, and for general relief.

The answer of R. Suggs, filed June 13, 1839, admits his marriage with complainant's mother, and that they separated under articles, about six years ago. Once took out letters of administration on estate of Young, in Alabama territory, gave bond, with Barton surety ; appraisers were appointed, who valued the property at \$629. Respondent sold the property, purchased part, does not know precise amount of sales ; it could not have much exceeded valuation. After the sale, respondent believed, and now believes, that the property never belonged to defendant, but was the property of William Rutherford, a former husband of Eliza-

Young v. Suggs, et al.

beth, by whom he had an heir named Franklin, who is still living, and was at the time of respondent's administration a minor. Seeing the situation of the property, respondent gave it up to Barton, the brother of the said Elizabeth, and the uncle of Franklin Rutherford and complainant. By direction of the Chief Justice of the Orphans' Court, respondent delivered over to Barton all the effects belonging to the estates of Rutherford and Young; respondent always understood that Barton was the legal guardian of the said Franklin and complainant. If he had retained all the property in possession of Elizabeth when he married her, it would not have compensated him for his expenses in supporting and educating said Franklin and complainant. But respondent denies that he derived any advantage from the use of the property, and he charges, that complainant is, in good conscience, largely indebted to him for trouble and expense in supporting and educating complainant during infancy, &c.

Supplemental bill filed 6th June, 1840, repeats the allegation of original bill, states the divorce of Suggs and wife, and files exhibit G, decree of divorce. Prays for relief, as before.

The answer to supplemental bill admits the divorce.

The proof was as follows.

Thomas H. Rogers deposes, that, in a conversation with complainant, Suggs admitted that the sale of his father's estate by him amounts to \$1100 or \$1200, and that complainant ought to have it, but that he, Suggs, ought not to pay it, inasmuch as he had already paid it to Barton. That he, Suggs, had the amount of sale (witness understanding him to mean the sale bill).

William Jolly deposes, that Suggs showed him an inventory of the effects of William Young, deceased, amounting (as deponent thinks) to \$1000 or \$1100, but being no scholar, he is not confident as to the amount. Witness further says, unequivocally, that the inventory, attached to this deposition, is the one shown him as aforesaid, which inventory, by correct calculation, amounts to \$619, the calculation on its face being inaccurate, amounting to \$6019. Deponent heard complainant admit, that Barton, instead of Suggs, ought to pay him his share of his father's estate.

Franklin Rutherford deposes, that six or seven years ago, he saw

Young v. Suggs, et al.

a letter from William Barton, addressed to Suggs, Elizabeth, and complainant, in which Barton expressed to them his regret at having heard that they entertained suspicions, lest he would never pay complainant his share of his father's estate, and added, that he utterly denied the suspicion, and requested complainant to call on him, and he would pay to the complainant his proportional part of his father's estate. Witness understood from the letter, that Barton was the proper person on whom complainant had his demand.

James C. Choate, proves the same with regard to Barton's letter, and also that complainant consulted with him, as to the policy of sending deponent to Barton for his said share of his father's estate, laying the same out in mules, and thereby making a speculation. Complainant previously told deponent, that his said share was in the hands of Barton.

Thomas Dew deposes, that he is acquainted with the handwriting of William Barton, from having seen him write; and on examining the receipt attached to this, deponent says, that it is the handwriting of Barton; said receipt being given by Barton to Suggs, acknowledging the reception by himself, as guardian of complainant, said complainant's share of his father's estate.

The guardian bond of Barton, as guardian to complainant, is filed to prove said guardianship; this bond was regularly certified, by the clerk of the Orphans' Court, of Marengo county, Alabama, under the seal of the Court.

R. Huntington, for complainant.

Suggs, as administrator, paid no regard to his duties, or the court of Alabama, which governed him as such. He fails to discover in his answer, whether or not he acted collusively with Barton; consequently he tacitly admits that he did. Standing, therefore, so highly obnoxious in equity, and having in law committed a *deseratio*, he should be chargeable with the *maximum* of his admission of the amount of sales with compound interest. The rate of interest in Alabama is eight per cent. Aik. Ala. Dig. 2d Ed. 236.

The complainant is entitled to two thirds of his father's estate,

Young v. Suggs, et al.

and his mother to one third. Aik. Dig. 128. The complainant is not bound by the act of 1826, which allows to him but one half. *ibid.* 236.

There is no proof of the alleged *direction* of the Judge of Probate in Alabama to the defendant, to deliver to Barton the property of his intestate ; that order, if ever made, is a matter of record, and should be exhibited. The doubt alleged in the answer, as to whom the property that came to the hands of the administrator really belonged, amounts to nothing. The defendant is *estopped* from denying that it belonged to his intestate, and the complainant is that intestate's distributee.

The pretence that Barton was the lawfully appointed guardian of the complainant seems equally unfounded ; for if he were such, the records of the Orphans' Court in Alabama must show the fact, and they are not relied upon ; the guardian bond on file, is not a record of the court.

Whether, however, Barton, as guardian of complainant, or surety for Suggs on the administration bond, or otherwise, received from Suggs the estate of William Young, the surrender would not exonerate Suggs, as administrator, unless sanctioned by an order of the Orphans' Court, and that on the revocation or renunciation of record, of the letters of administration to him, of which order, revocation, or renunciation, nothing is seen or shown in this case.

The testimony taken in the cause is not therefore relevant, and if so, it is illegal and inadmissible in its present aspect, being of a *secondary* nature, and establishing by *parol*, what should be proved by records, without laying that preliminary foundation, essential to the introduction of secondary evidence.

Lea, for defendant, Rowland Suggs.

1. It is admitted that Rowland Suggs administered on the estate of complainant's father, and would be chargeable, but for the facts which exonerate him from present liability.

2. In exoneration of Rowland Suggs, the following considerations are suggested : — The difficulty, known as matter of history, of obtaining record evidence of administrations in the early times of the

Young v. Suggs, et al.

Alabama territory, in the venue of the transactions in question ; and the difficulty of obtaining any evidence as to occurrences more than twenty years before the filing of the bill, the administration having been granted in 1818. But there is evidence enough that William Barton, the guardian of complainant, received whatever he could be entitled to. The bill admits that Barton did receive the property, but pretends that he did so under some claim or demand as surety of the administrator ; but the contrary and true character, in which he received the property, appears unquestionably. It is altogether improbable that the property would have been surrendered on the ground pretended in the bill; and it is equally probable that it would have been surrendered to a guardian, if at all. But we have filed record evidence that Barton was the guardian of complainant ; and the receipt of Barton proved that he received complainant's share, as his guardian, which is fully corroborated and confirmed by the repeated admissions of complainant, without going into the contents of any letter from Barton, which may be adverted to, however, as the occasion and subject of complainant's remarks. This being established, it is not necessary to consider the exaggerations as to the value of the estate, which would appear absurd, if tested by the proved rates of appraisement and the aggregate. Nor is it necessary to seek a credit for the maintenance, &c. of complainant, from three to sixteen years old — he being, by the way, not quite so young as he pretended at the time of filing his bill. Nor is it necessary to dwell on the probable motive of complainant, in seeking to make the husband of his mother, living apart from her, but not far off, and with some property, accountable, rather than resort to his guardian and uncle in Texas, as to whose ability to pay he said he was doubtful, and to whom he might at last resort, if unsuccessful here.

CHANCELLOR. This bill is filed by the complainant for the purpose of recovering a distributive share of the estate of his deceased father, which he alleges came to the hands of the defendant as the administrator of that estate, and for which, it is charged, he has never accounted.

The answer of the defendant admits he was the administrator as

Young v. Segga, et al.

charged, and says that he paid over to the regularly appointed guardian of the complainant his entire share in his father's estate, and exhibits the guardian's receipt to that effect, which is fully proven by the witnesses in the case, who show that the guardian ran off to Texas, carrying with him the complainant's patrimony, which seems to fully account for the institution of this suit ; as the testimony shows, that that is the only claim it has to any consideration. Let the bill be dismissed at the costs of the complainant.

Wright, et al. v. Shelton, et al.

DECEMBER TERM, 1843.

DANIEL W. WRIGHT, et al. v. W. H. SHELTON, et al.

Where the complainants in a bill in chancery assert one general claim, and the defendants have a common interest in the point litigated, they are properly united, though their rights as to the subject-matter of the suit may be separate.

A. being a judgment-creditor of B., filed his bill in equity against B., C., D., E., and F., charging that C., D., E., and F. were each, respectively, in possession of property belonging to B., conveyed by B. to them individually, to defraud the creditors of B., and seeking to subject this property, in the hands of these different persons, to the payment of his judgment; *held*, upon the demurrer of these defendants, and answers denying fraud, that the bill was not multifarious.

It is not necessary to the joinder of different defendants, in the same bill, that a privity exists between each two of the defendants, provided a privity exists between each of the defendants separately, and the other defendants, upon whom the *graeomen* of the bill rest.

Where, by statute, a judgment-creditor who has run his execution without effect, can by garnishment, at law, bring in the debtors of his judgment debtor, and divert their debts to the satisfaction of his own; a court of equity will, by analogy to the proceedings at law, under similar circumstances, adopt a similar course.

Courts, acting under the same system of local jurisprudence, should, where their organization and mode of procedure admit of it, make their judgments equally comprehensive.

This cause was submitted upon the demurrer of two of the defendants, according to the practice of the Court. The opinion of the Chancellor presents a full view of the points made by the demurrer, and those portions of the bill to which they refer, and no abstract of the bill is therefore given.

Hughes, for the demurrer.

It is insisted, that the defendant Hughes has nothing to do with the charges of fraud against the defendants, who were directors of the Mississippi and Alabama Railroad Company; and so as to John Martin.

As to both defendants demurring, they are not charged to be participants in the fraud cancelling the mortgages given to secure payment of debts and stockholders.

The only ground upon which the other defendants can be charged

Wright, et al. v. Shelton, et al.

jointly, is, that they fraudulently combined to release the mortgages. See Story on Eq. Pl. 224, *et seq.*

Cocke, for the bill.

A complainant is not permitted to demand several distinct matters of distinct natures against several defendants; nor can several complainants demand by one bill several matters, perfectly distinct and unconnected, against one defendant; nor joint and separate demands against the same defendant. *Terrell v. Craig*, Halst. Dig. 168.

But where one general right is claimed by the bill, though the defendants have separate and distinct rights, an objection for multifariousness cannot be maintained. Ib.

A bill which only sets up one sufficient ground for equitable relief, is not rendered multifarious by the insertion therein of a separate and distinct claim, upon which the complainant is not entitled to ask for either discovery or relief. *Varick v. Smith*, 5 Paige, 254.

The complainant may join in the same bill two good causes of complaint arising out of the same transaction, where all of the defendants are interested in the same claim of right, and where the relief asked for as to each is of the same nature. Ib.

A bill in equity is not multifarious where one general right is claimed by the plaintiff, although the defendants may have separate and distinct rights. *Dunmock v. Benby*, 20 Pick. 368.

CHANCELLOR. The complainants, as the judgment creditors of the Mississippi and Alabama Railroad Company, having exhausted their remedies at law without effect, file this bill for the purpose of subjecting certain equitable assets of said Railroad Company, to the satisfaction of their judgment. It appears that the defendants, Moss, Puckett, Hobson, Coffee, and Shelton, being directors of said institution, and being largely indebted thereto for borrowed money, and on account of their subscription for stock, did severally make and deliver to said company their respective mortgages upon various tracts of land, and negro slaves, for the purpose of securing their several and respective liabilities to said company. It is alleged, that these defendants, sustaining the double relation of direc-

Wright, et al. v. Shelton, et al.

tors and debtors to said company, passed a resolution by which the mortgages were ordered to be released and cancelled, without any money having been paid thereon, or other real satisfaction being made, of the debts which said mortgages were intended to secure. That, after such releases had been made, the said Moss assigned in trust, to the defendant Hughes, the property embraced in his said mortgage to said company: that the said Coffee has made an assignment of the property embraced in his mortgage aforesaid, to the defendant Martin, upon some trust or conditions unknown to the complainants: that both said assignments were made with full knowledge of the prior mortgages to said company, and in fraud of the complainants' said judgment. The bill prays that these mortgages may be declared in force, and carried into effect for the satisfaction of said judgment. To this bill, the defendants Hughes and Martin have each filed their separate demurrs, together with answers denying the fraud charged in the bill. These demurrs were set down for argument according to the practice of the Court. The ground taken by each, is, that the bill seeks relief upon separate and distinct matters, and against separate and distinct persons, having no privity of interest in regard to the several matters of the bill. Whether this ground is well taken or not, will be best illustrated by an application of the settled principles of pleading as to the admissibility of uniting different matters against the same or different defendants, in the same bill. One of the leading rules upon this subject, is, that where the complainant asserts one general claim, and the defendants have a common interest in the point litigated, they are properly united, although they may have separate rights as to the subject-matter of the suit. Here, the complainants are the judgment creditors of the railroad company, and the object of their bill is to obtain satisfaction of their debt out of the effects of that company, which they allege have been fraudulently passed into the hands of the present defendants. It is to be remarked, that the principal defendants were the directors of that company, charged with the administration of its affairs, and with the preservation of its effects. They held these effects as trustees, for the benefit of the creditors and stockholders of the institution, and were bound to administer them in good faith. And yet the bill shows, that these

Wright, et al. v. Shelton, et al.

defendants, after having mortgaged certain of their property to the company, they subsequently, in their character of directors thereof, ordered these mortgages to be cancelled, and the property reconveyed to themselves, without having paid a dollar of the money due thereon, and that the after-assignment to Hughes and Martin was made with notice of these facts, and without any consideration therefor. The answers of Hughes and Martin do not deny the notice charged, but simply deny all fraud and combination. The charge, therefore, of notice, and of want of valid consideration in the assignment to them, are left in full effect, as charged in the bill. Here, then, are a series of joint acts on the part of Hobson, Coffee, Moss, Puckett, and Shelton, by which it was intended, as is alleged, to defraud the creditors of the company, and discharge themselves as its debtors. The general claim of the bill, is, to have the property, which was the subject of their fraudulent transactions, applied to the satisfaction of the complainants' judgment. This property is claimed by the bill, as the property of the railroad company — the judgment debtor of the complainant. Each of the defendants are alleged to be in possession of, or claiming some separate interest to different portions of that property. It is thus apparent, that the main point in litigation, is the alleged fraudulent release of the debts and mortgages, by which Shelton, Puckett, Moss, Coffee, and Hobson, in their character of directors, discharged themselves from the debt which they owed the company, and reconveyed to themselves the mortgaged property, which property constituted a part of the assets of that company, without any consideration whatever. Hughes and Martin derive their claim through this tainted and fraudulent channel ; and, although it is not pretended that they were guilty of any fraud themselves, yet, unless they stand in the light of purchasers without notice, for a *present* valuable consideration, I apprehend that the claim of the creditors of the company must be regarded as paramount to theirs. *Whelan v. Whelan*, 3 Cow. R. 537. I think, from these views of the case, that there is sufficient connection shown between the different defendants and the subject-matter of the suit, to authorize their joinder in the same bill. Although there is no privity shown between Martin and Hughes, yet there is a privity between each of them and the other defendants,

Wright, et al. v. Shelton, et al.

upon whom the *gravamen* of the bill rests. The case, divested of all its verbiage, is simply this : the complainants, as judgment creditors of the Alabama Railroad Company, ask to subject the property of their debtor to the satisfaction of their claim, which they allege has been transferred to the hands of the defendants, without any consideration. In the case of *Fellows v. Fellows* (4 Cow. Rep. 682), it was held, that where a judgment debtor has conveyed different portions of his property to different persons, in fraud of his creditors, that each of such purchasers may be united with the debtor in the same bill, by a judgment creditor. And, in the case of *Boyd v. Hoyt* (5 Paige's Rep. 77), Chancellor Walworth held, that you may unite in a creditor's bill, two or more persons indebted to the judgment debtor, at different times or for distinct sums. It is true, that the Chancellor seemed to place his decision upon the provisions of a statute of New York ; but it had been repeatedly before decided, that that statute was merely declaratory of the powers and jurisdiction of a court of equity, as they existed before its passage. *Hadden v. Spader*, 20 John. Rep. 554 ; *Cassiday v. Meacham*, 3 Paige's Rep. 312. If such jurisdiction did not exist upon general principles of equity jurisprudence, I should be inclined to assume it, in analogy to a proceeding at law authorized by a statute of this State. By that statute, a judgment creditor, who has run his execution without effect, may, by the process of *garnishment*, bring in the debtors of his debtor, and divert the payment of their debts to the satisfaction of his own. It would be a reproach upon the principles of equity, to hold that the rights and remedies of a judgment creditor are less comprehensive in this Court than at law. Courts acting under the same system of local jurisprudence should make their judgments equally comprehensive, where their organization and modes of proceeding will admit of it. Upon the whole, I am of opinion that the demurrer must be overruled.

DECEMBER TERM, 1843.

EDWARD BOISGERARD, et al. v. MICHAEL WALL.

Where the parties in interest are so numerous as to render it inconvenient, if not impracticable, to make them all defendants, without great delay and expense ; and justice can be done between the parties before the court, without affecting the interest of the others ; the court will proceed to a decree, notwithstanding the want of parties.

Where there were one hundred partners, who had each executed a mortgage to secure the debts of the partnership, and some of the partners were dead, leaving numerous representatives ; held, that the mortgagee might foreclose each mortgage, by a separate suit against each partner, without making the others parties.

An unincorporated association of men, for the purposes of banking, is but a private partnership, and their contracts and liabilities are those of private partners.

Articles of partnership regulate the rights and powers of the partners, as among themselves, but as to third persons, they may be altered by the conduct of the partners, so as to be contrary to, or beyond, their original terms.

Where, by the articles of a partnership association, for the purpose of private banking, each partner was to execute a mortgage to the partnership, to secure the payment of his stock in the partnership, and afterwards the mortgages were made, securing not only the stock, but also the circulation and debts of a general character, of the partnership ; held, that the mortgages were a security for the debts of the partnership, to which a creditor, to whom the partnership had assigned the mortgages, might resort for payment.

The interest of a mere mortgagee is in the nature of a *chase in action*, and cannot therefore be seized and sold under an execution at law.

Where debts due to a partnership, in five, ten, and fifteen years, had been secured by mortgages, the creditors of the partnership could not have any more summary remedy on the mortgages, than the partners themselves would have.

Where each partner executes a mortgage to the partnership, for the purpose of "binding and rendering himself liable to pay the" partnership debts, and, in the condition of the mortgage, recites that the mortgage is to be discharged when the *liabilities* of the partnership are *all* paid ; held, that one of the objects of the mortgage was to secure the payments of the debts of the partnership.

THE bill states that Michael Wall, and more than a hundred other persons, entered into articles of partnership in April, 1838, for the purpose of banking, under the style of the Real Estate Banking Company of Hinds County. The names of the partners are given, and the terms of the partnership.

That M. Wall subscribed for 239²⁸/₁₀₀ shares of stock in the association, and executed a bond to the president and directors of the company for the sum of \$23,929·29, to be defeated upon

Boisgerard, et al. v. Wall.

the payment of one third thereof at the end of 5 years, from and after the first day of January, 1839; one third thereof at the end of 10 years, and the other third at the end of 15 years from said date, and upon meeting and satisfying any other call that might be made upon him by the said president and directors, in pursuance of the requirements of said articles of association.

And that, on the said 3d day of July, in the year 1838—the day of the date of the bond—the said M. Wall, still further to secure the amount of the stock by him subscribed, punctually, and at the periods in said bond specified; and to bind and render himself liable in conjunction with each and every of the stockholders of the said Real Estate Banking Company, to all and singular the holders of the notes, bills, checks, and other liabilities of the said Real Estate Banking Company of Hinds county, then existing, or which might exist, at any period during 15 years, from and after said first day of January, 1839; conveyed to said president and directors, by indenture of mortgage, certain lands lying in Hinds county, which was duly delivered, certified, and recorded, &c.

And that, at a meeting of the board of directors of said company, held at Clinton, in February, 1839, it was resolved, that Joseph Davenport and Jacob F. Foute, should be, and they were appointed commissioners to negotiate a loan in New Orleans, with power to sell, transfer, pledge, or hypothecate the stock, bonds, and mortgages of the company, as collateral security for the repayment. And that, on the 6th of March, in the year 1839, a letter of attorney, with full powers, was made to them accordingly. That an agreement was entered into with the complainant, Boisgerard, by them, on or about the 9th of March, 1839, for the loan or advance by him to said company of \$300,000, in consideration that the company would execute and deliver to him their joint and several bond, in the penal sum of \$600,000; conditioned for the payment of \$300,000 with interest, at 7 per cent., and all proper costs and charges, on or before the first day of March, 1840, by shipments of cotton to Bonnaffre, Boisgerard, & Co. of Havre; and would assign and deliver to complainant, John Delafield, as trustee, certain bonds and indentures of mortgage, mentioned in a schedule annexed to said articles of agreement, amounting to

Boisgerard, et al. v. Wall.

\$600,000 and upwards, with power and authority to him to collect the amounts due upon, and secured by the said bonds and the said indentures of mortgage, or to sell the said bonds and indentures of mortgage in case of need, and to apply the proceeds thereof to the payment of all or any sums of money due from the company to the complainant, Boisgerard. And that, between the date of said agreement and the 20th June, 1839, the said company should ship to Bonnaffre, Boisgerard, & Co. at Havre, 5000 bales of cotton, out of which complainant, Boisgerard, was to receive \$100,000 towards the repayment of said \$300,000. And that, in case the company failed to perform their agreement, that they should reimburse to the complainant, Boisgerard, the amount of his advances in 90 days, and that the date of such failure should be fixed by notice of John Delafield, and a copy addressed to the company.

That the money (\$300,000) was advanced, the bond for \$600,000 executed, and deed made in pursuance of the agreement, by which the president and directors of said company, for the consideration of one dollar, and for divers other good causes and considerations, granted, bargained, sold, assigned, transferred, and set over to complainant, John Delafield, all the said several indentures of mortgage in the said instrument specified, being those mentioned in the schedule annexed to the agreement, together with the bonds or writings obligatory, in the said indentures of mortgage described, and all moneys due, or to become due on the said bonds or writings obligatory, and said indentures of mortgage ; constituting said Delafield the agent, to use all lawful means to collect said moneys, &c. That among the mortgages and bonds so sold and transferred, was that of Michael Wall. That Boisgerard complied with his agreement ; the company did not comply with theirs, and that they owe him \$305,988 and 56 cents, and interest since March, 1840 ; whereby M. Wall became, and was, and still is, liable and bound to complainant, Boisgerard, to pay the same.

The bill charges, that the whole amount of \$23,929.30, mentioned in the condition of the said bond or writing obligatory, and the said indenture of mortgage executed by the said M. Wall, as aforesaid, and secured thereby, still remains due and unpaid, no part having been paid before the transfer, or since ; by which the estate

Boisgerard, et al. v. Wall.

has become absolute in law, in complainant, Delafield, as trustee for complainant, Boisgerard : and that said mortgaged premises are a slender and scanty security, and wholly inadequate for the payment of the said sum of \$23,929·20, mentioned in the said indenture of mortgage, executed by the said Michael Wall ; as aforesaid, and that the whole property mentioned in all the said indentures of mortgage, conveyed and assigned to said Delafield, in trust for said Boisgerard, are wholly inadequate, and are a slender security for the payment of said \$305,988 and 56 cents. And the bill states, that the complainants do not seek to bring in, as parties to the suit, the great body of stockholders in, and subscribers to, said company ; for the reason, that the great number of them, and the change of residence and death of many, would render it impossible to bring them all, and the heirs and representatives of such as have died, or may die during the pendency of the suit before the Court.

The bill prays that the said Michael Wall may be decreed to pay the said sum of 23,929·20, mentioned in the condition of the said bond or writing obligatory, and the said indenture of mortgage executed by him, or the said sum of \$305,988·56 and interest : by a short day, &c., or in default, that he and those claiming under him, may be foreclosed of and from all equity of redemption in, and to said mortgaged premises, &c., and for general relief, &c. With the bill, as parts of it, exhibits are filed from A. to J., of the above facts.

Two points are taken on the demurrer.

1st. That all persons having a direct interest in the decree to be pronounced, are not made parties to the suit.

2d. That the debt secured by the mortgage was not one at the time of the filing of the bill, nor for more than a year thereafter.

C. R. Clifton, on behalf of the demurrer.

1st. By the bill and the articles of the partnership, filed as an exhibit, it appears, that more than one hundred persons became members of the Real Estate Banking Company of Hinds County, for the term of fifteen years, and that the conduct of the affairs of the company was to be intrusted to a president and board of di-

Boisgerard, et al. v. Wall.

rectors, who should serve until the 1st Monday of March, 1839, on which day, and on each succeeding 1st Monday of March, during the existence of the company, there should be an annual election (see exhibit A, art. VI. and p. 3, 4 of bill), and that, on the 1st Monday of March, 1839, at a regular meeting of the stockholders, held pursuant to the provisions and requirements of said articles of association, certain persons (naming them) were duly elected directors for the ensuing year. Now, the general rule is, that you must have before the Court all parties, whose interests the decree will affect, because they are concerned to resist the demand, and to prevent their fund from being exhausted by collusion. The bond and mortgage here, were made by a member of the company, to the president and directors of the company, and thereby became the fund of the company. With other bonds and mortgages, to the amount of \$600,000, they were transferred to the complainants, who allege, that they are a very inadequate security for their debt of \$305,988.56. It is the interest of the *company* that these bonds and mortgages shall pay as much of their debt as practicable, because they are liable for whatever may remain unpaid out of their other assets. It is the interest of the *individual* mortgagors that they may bring as little as possible, that thereby they may reacquire their mortgaged estates, disincumbered of these mortgages, for the smallest possible sum. The *company* is, therefore, directly and deeply interested in the controversy, and ought to be made a party to it. In *Gifford v. Hart*, (1 Schoales & Lefroy, 386), it was held that a decree obtained without making those whose rights were affected parties, was fraudulent and void as to those parties. The same principle was declared in the House of Lords, in *Gore v. Stackpoole* (1 Dorr's Rep. 18), in which it was held, that to make a foreclosure of a mortgage valid, all parties in interest must be brought before the Court. I am aware, that the inconvenience of this rule has sometimes led to its relaxation, both in England and the United States ; but Mr. Justice Story (2 Eq. 741), alluding to the legal rule, says, it is of a far more extensive nature in equity, whose courts frequently require all persons who have remote and future interests, or who are directly affected by the decree, to be made parties ; and they will

Boisgerard, et al. v. Wall.

not, he says (p. 742), if they are within the jurisdiction, and capable of being made parties, proceed to decide the cause without them. It is not alleged in the bill, and could not be, that a majority of these persons are not within the jurisdiction of the court, and capable of being made parties. That some are beyond the jurisdiction of the court, may be a sufficient reason for omitting them ; but it does not follow, because you may omit some, you may omit all.

If, however, the Chancellor should be of opinion, that, in a case like the present, all the members of the company need not be made parties, in consequence of the inconvenience and delay which might result from it (and it is conceded that some chancellors have gone that far), still it is believed, that no case can be found, where a bill has been entertained against one member of a joint stock company, which conducted its affairs by a president and directors, without, at least, making them parties, which is in effect making parties of all the company ; and there is an obvious propriety, not to say legal necessity, in this : the company makes its contracts through these agents and members, and they are proper parties to all suits, seeking an adjustment of their contracts. It was so held in a case referred to in a note to 15 Vesey, 14, and this seems to have been the opinion of the complainants, from the frame of their bill, as they have made parties of those persons who were directors at the time of their contract. They have shown by their bill (p. 3, 4), that according to the articles of association, there was to be an annual election of directors on the first Monday of March in each year, for fifteen years, the period for which the partnership was formed ; and that they made the contract therein set forth, with the directors, elected on the first Monday of March, 1839 ; and they bring their bill against these same persons, in the year 1842, without alleging their reëlection, or that no election has since taken place, or any other matter or thing which gives plausibility to the idea, that these same persons have any interest or concern, whatsoever, in this company, as directors. The amount they claim is large, very large, and the defendant M. Wall, as an individual member of the company, having no connection with its active business, can know nothing of its justness, nor whether the

Boisgerard, et al. v. Wall.

payments made have been credited, nor whether the sums charged were received ; and certainly the persons having charge, as directors, of the books and business of the company, at the time of the bringing of the bill, and not those who were such in 1839, when the contract was made, are the proper and the only proper and necessary parties, and there is no averment in the bill to repel the necessary inference, that the affairs of the company are now in the hands of other and different persons. For these reasons, then, the demurrer is well taken, as to the first point.

2. The second point is, that the bill was brought before the debt secured by the mortgage became due.

The bond is for \$23,929·20, and is dated the 3d day of July, 1838. The condition is for the payment of one third of that sum at the end of five years, from and after the 1st day of January, 1839, one third at the end of ten years, and the other third at the end of fifteen years from the date aforesaid ; and that the obligor should meet and satisfy any other call that may be made by the president and directors, in pursuance of the requirements of the articles of association.

The bond is for the amount of stock subscribed for by M. Wall. The articles of association require, that the stock shall be secured by bond and mortgage on unencumbered real estate. The mortgage is intended to secure the amount of the bond, and to render the mortgagor liable, with each and every stockholder, to all and singular the holders of the notes, bills, checks, and other liabilities of the company then existing, or which might thereafter exist for the period of fifteen years. This latter clause creates no additional liability on the part of the mortgagor ; he was, without it, liable for all the debts the company might contract. Before the agreement of the 9th of March, 1839, with the complainants, any creditor of the company might have filed a bill against the proper parties, and subjected this fund, or the mortgaged premises, to sale, for the satisfaction of his debt. By this agreement a special appropriation of this fund, or bond and mortgage, and the premises on which they reposed for security, was made, and any creditor seeking to reach it, would have been enjoined from doing so, at the instance of the present complainants ; seeing that the agreement thus appropriating

Boisgerard, et al. v. Wall.

it (or deed) was matter of record in the county in which the land was situated. What was it that was thus specially appropriated to the complainants? Was it the general liability of Michael Wall, as a member of the company, or was it the bond and mortgage, and the land on which they rested? The nature of the case, as well as the contract of the parties, determine it to be the latter. The *general liability* is incapable of transfer or special appropriation, and is a resource alike open to every creditor, and incapable of extinguishment, as long as a debt of the company remains; but it must be reached through the judgment of a court of law. The mortgaged property was also open to every creditor, until specially appropriated, when it became the peculiar fund of the party to whom it was transferred, and to whom it can only be made available by a sale under a decree of the court of chancery; and when thus sold, it ceases to be any longer a resource or fund for either general or special creditors, and is in fact extinguished. If it fail to satisfy the debt of the special creditor, the general liability of the mortgagor is still open to him; but as to that liability, he occupies the same position of any other creditor, and must reach it through the courts of law also.

To this view the contract fully conforms. In the second article of this contract, p. 38, in enumerating what is to be done by the company, it is said, "the said parties of the first part will also assign and deliver the several bonds and mortgages, of which a list is hereto annexed, amounting in the aggregate to \$600,000 and upwards, to John Delafield, Esq., of New York, banker, in trust, but with full power to collect and sell the same, in case of need," &c. In the list of bonds and mortgages referred to, will be found that of M. Wall, stated at the amount of the bond precisely (\$23,929.20). What, then, was this bond and mortgage a security for, in fact, as well as in the contemplation of the parties? Why, undoubtedly, for \$23,929.20. Was it a security for this sum then presently due? This could only be ascertained by looking at the bond and mortgage. Doing so, it was found the obligor was unwilling to undertake to repay that sum, immediately, and that he only undertook to pay it, in five, ten, and fifteen years from the first day of January, 1839. This was his agreement; it hath this extent, no more; and

Boisgerard, et al. v. Wall.

by his agreement only is he bound. Was the bond, thus drawn and secured by mortgage, a satisfactory security to the complainants? From their having received it as such, there can be no contrary inference; and they cannot now either increase the amount of the security, or diminish the time it had to run to maturity. The contract of the defendant, M. Wall, with the company, of which he was a member, as transferred to the complainants, is the measure of his liability, and of their rights; and if it be insisted that he is liable for the whole debt, it does not thence result, that he is liable for it, under this bond and mortgage; on the contrary, the bond and mortgage fix the precise amount of the liability of which they are the evidence, and the period of its payment. There is as much or more difference between his general liability as a member of the firm, and his special liability under the bond mortgage, as there is between an express and an implied assumpsit; the former being limited by its terms, and the latter being only limited by the amount of the parol indebtedness.

If the complainant, Delafield, had sold these bonds and mortgages, as he might have done under the contract, what would he have sold? Not the general liability (as to this case) of M. Wall, but his bond, due in five, ten, and fifteen years, secured by a mortgage on real estate; and the parties, when they speak of the right to sue, could have intended nothing further.

And the complainants, when they come to ask a decree of the Court, ask for the said sum of \$23,929·20, "mentioned in the condition of the said bond or writing-obligatory and the said indenture of mortgage," and yet do so, more than twelve months in advance of the maturity of the bond; can they trace their right to the bond, secured by the mortgage, and yet disregard the main feature of the instrument — the period at which the sum it secures becomes payable? I think not, and shall so continue to think, unless my opinion is shaken by stronger reasons than my own reflections have supplied.

George L. Potter, for complainants.

The first objection, that all of the partners, members of the company, are not made parties to the bill, is a manifestly insufficient cause of demurrer.

Boisgerard, et al. v. Wall.

It is not true, as suggested by the demurrer, that the bill states a mortgage "made by one of the defendants to a partnership consisting of more than 100 members." The mortgage is made to "the President and Directors of the Real Estate Banking Company of Hinds county," and not to the company at large.

In this State, it is "sufficient" to "declare or complain" against any one or more "of several copartners." How. and Hutch. 595, sec. 30. In sec. 32, at same page, the word "complainants" is used, showing that the statute applies as well to proceedings in chancery as to actions at law.

Again, the bill shows a case in which, by reason of the multiplicity of parties connected with this association, there is an utter impossibility of bringing before the court, in one suit, all of the persons in interest. The general rule, that all parties in interest must be joined, is merely a rule of convenience, to enable the Court to settle by one decree, matters that might otherwise cause a variety of suits; and whenever an adherence to it would produce great inconvenience, or amount to a denial of justice, the Court will dispense with the rule, for the same reasons that caused its adoption. The time is long past, since a court of chancery, on a mere technicality, would deny relief in a case of manifest equity shown by a complainant. *Van Vechten v. Terry*, 2 John. Ch. R. 197; *Adair v. New River Co.*, 11 Ves. 443; *Wise v. Blachley*, 1 John. Ch. R. 438; *Cockburn v. Thompson*, 16 Ves. 326; *Ex're Brashear v. Van Cortlandt*, 2 John. Ch. R. 247; *Wendell v. Van Rensselaer*, 1 John. Ch. R. 350.

In the case made by this bill, Wall represents his equity of redemption in his original estate; the directors, parties defendant, represent their equity of redemption in the mortgaged estate, assigned to Delafield, one of the complainants; they also, as the officers and trustees of the company, under the articles of association, represent the interests of their copartners, as *cestuis que trust*, under the mortgage. So that the bill brings before the court Delafield, in whom is the legal estate in the mortgaged premises; the directors, in whom is the equity of redemption under the assignment to Delafield; and Wall, in whom is the equity of redemption under the original mortgage. Now, it was not necessary to bring in the sev-

Boisgerard, et al. v. Wall.

eral members of the copartnership, because the *legal estate* in these lands was never in them ; and because the articles of association vest the entire interests of the company in the directors, as the managers and agents of the company, and give them power, as such, to create debts binding on the company. These directors may, then, properly represent the company in proceedings for the satisfaction of debts so created. *Van Vechten v. Terry, et al.*, 2 John. Ch. R. 197.

Again, two distinct interests are provided for in the condition of this mortgage ; that is, the interest of the copartnership, and the interest of its creditors. The former is the amount of the stock-bond, and also such debts as Wall may owe the company ; the interest of the creditors is the amount of their claims against the company. The *power* of the directors under the mortgage was this — to charge the mortgaged premises with such debts as they might contract for the company ; to discharge the lands, by a *bona fide* release from the claims of all subsequent creditors of the company ; to vest, by an assignment of the mortgage, in any creditor of the company, a right to prior satisfaction out of the lands, not only as against subsequent creditors of the company, but also and particularly as against the company itself ; to authorize such preferred creditor to subject the lands to the payment of his debt, by a foreclosure and sale, and hold the surplus for the directors. Now, what have the directors done ? By the assignment to Delafield, they have vested in him not only the legal estate in the lands, but also a power to foreclose the mortgage, and sell the premises in the same manner as if he had been the original mortgagee. So that in fact there is no equity of redemption, under the assignment to Delafield, to be overreached by a foreclosure, and the bill might have been filed against Wall alone, to foreclose his equity of redemption under the original mortgage. The power granted by the assignment to Delafield, to foreclose and sell the premises, and from the proceeds to pay the debt of Boisgerard, " rendering the overplus, if any there should be," to the directors, is a clear authority for Delafield to proceed against Wall alone for a foreclosure and sale ; and such sale would transfer the entire mortgaged interest to a purchaser. This would be strictly within the power granted to Delafield by the direc-

Boisgerard, et al. v. Wall.

tors, and they had full power so to stipulate. (Vide, Assignment, p. 45 ; Art. of Association, last clause of art. 6, p. 27, and art. 24, p. 29.)

Parties may agree to waive their equities under mortgages, or to subject them to other rules than those which usually govern a court of chancery in adjusting such equities. Mortgages with a power of sale are an instance of such waivers, and such are very like the assignment in this case to Delafield. The mortgagor may prevent a sale under the power, by filing his bill to redeem ; but the mortgagee might sell, under the power, without a foreclosure, and the mortgagor would be bound by the sale. Now, the directors have stipulated (precisely as a mortgagor might for the sale of his estate by the mortgagee), that Delafield might proceed to foreclose against Wall, and, by a judicial sale of the premises, pay the debt to Boisgerard. The directors would be bound by such sale, in the same manner as a mortgagor would be bound by a sale under the power inserted in his mortgage.

But the complainants have chosen to bring in the present directors of the company, in order that it might be fairly represented in the cause. The argument of Judge Clifton goes beyond his demurrer, and suggests that the bill does not show that these are the present directors of the company. The bill states that the directors were to hold over until their successors were duly elected (p. 4) ; they are named as the present officers of the company, and as such are charged as combining, &c. with Wall (p. 21) ; and as such officers, combining, &c., process is prayed against them. Judge Clifton cites *Cullen v. Duke of Queensbury*, 15 Ves., note to p. 14, to show that the present directors should be made parties ; but that case only shows that the directors' "contractors" need be parties. That case is reported in 1 Brown, Ch. Rep. 101, where it appears that the defendants were the former directors. The reporter, according to his custom, makes his marginal note a part of his report, and there states, — "Committee of a voluntary association, entering into agreements with tradesmen for the whole, sufficient to make them parties to a bill, and not necessary to include all the subscribers."

But suppose the objection to exist, this demurrer does not reach

Boisgerard, et al. v. Wall.

it, because it is not stated as a cause of demurrer ; nor is it the subject of a demurrer ; because, the bill does not show that these directors are not the present officers of the company ; it might be good matter for a plea. If the bill did show such a defect, the demurrer should point out the proper parties (Mitsford Pl. 238, 239) ; but this demurrer merely states, that "more than one hundred" partners are not made defendants. To reach the objection taken in the *argument*, the demurrer should aver, that the directors' defendants are not the present directors, and such a demurrer would be bad as a "speaking demurrer."

The second objection is also an insufficient cause of demurrer.

The mortgage was not given "primarily" to secure the payment of the stock-bond. The intent is stated in the mortgage, to pledge the lands as a security for the creditors of the company, the holders of the notes, bills, checks, and other liabilities of the company (mortgage, p. 31, 32). The lien on the lands was to be coextensive with the "general liability" of the stockholders, and the condition of the mortgage was framed accordingly. The capital stock of every copartnership is "primarily" liable to the creditors of the firm, and the legal result of the terms of this mortgage, is, that the holders of claims against the company, shall have a priority of satisfaction out of the mortgaged premises. This was manifestly the intent of the parties, for, by the terms of the mortgage, a creditor might subject the lands *presently* to the payment of his debt, but the company could not proceed until after the first instalment of the bond fell due, or some "call" had been made on the mortgagor.

What was the object of this association ? Its declared purpose was banking, or, as it is expressed in the articles, to "cause a prudent expansion of the monetary issues" (Articles of Association, preamble); and provision is accordingly made "for the issues of the company" (p. 27, art. 13) ; and the amount of these "issues" was to be regulated by the value of the mortgages. It was expressly provided (p. 29, art. 23), that the "bills, notes, &c.," of this company, should be secured by the mortgages. The directors prescribed this form of mortgage, as they were authorized

to do (p. 26, art. 2) ; so that the insertion of the "notes, bills, &c.," in the condition of the mortgage, was simply a compliance with the letter and spirit of the articles. Independently of this general clause for the protection of creditors, a court of equity would subject these lands presently to the payment of the debts of the company, either by a sale of the entire premises as part of its assets, or by assessing the present value of the mortgage interest of the company, and decreeing a sale for that amount. It is true, as Judge Clifton argues, that this clause of the mortgage, in relation to the "notes, bills, &c." creates no additional "liability" against the mortgagor ; but it does create an additional *security* for the creditor. This clause was not inserted to limit or extend the liability of Wall as a partner, but to declare the extent and purpose of the *pledge* created by the mortgage. The demurraints admit the nullity of this objection, in the course of their argument to sustain it, thus ; "before the agreement of the 9th of March, 1839, *any creditor* of the company might have filed a bill against the proper parties, and *subjected this fund or the mortgaged premises to sale*, for the satisfaction of his debt." In such a case the creditor would not have proceeded against "the general liability of Michael Wall," neither against "bond and mortgage, and the land on which they rested;" but against the land as being a specific pledge, set apart by the mortgage, to secure debts created by the company.

If the pledge proved deficient, resort might be had to his "general liability." It is also true, that the "bond and mortgage" were, by the agreement, to be transferred to Delafield ; "what then was this bond and mortgage a security for, in fact, as well as in the contemplation of the parties?" The bond was no "security," it was simply a legal *obligation*, constituting a cause of action, and altogether independent of the mortgage ; the bond was a liability against Wall, for the amount secured by it ; but Wall was subject for the whole amount due to Boisgerard, by reason of his "general liability." On the other hand, the mortgage was a "security" to the full value of the lands, and that, independent of the bond.

The "bond" is indeed embraced by the terms of the mortgage,

Boisgerard, et al. v. Wall.

but it was not to be transferred as a "security" for the prompt payment of the loan ; the latter was to become due long before the first instalment of the bond. Why then was the bond transferred with the mortgage ? For this, that the *entire mortgaged estate* might be under the control of Delafield as trustee, for the better security of the loan ; that no third party might acquire rights under the bond ; that it might be beyond the control of the Real Estate Banking Company ; in this view the transfer of the "bond" was a "security."

It may be that complainants anticipated the claim now set up, by Judge Clifton, that the mortgage was given "primarily" to secure this bond ; and, to avoid the force of that objection, stipulated, that the bond should be transferred with the mortgage. Admit it to be true, that the bond was to be first paid out of the mortgaged premises, or that it was to be paid *pro rata* ; by the transfer of the bond, complainants are subrogated and substituted, in the place of the directors and of the company, and so are entitled to prior and full satisfaction, before the directors or the company can claim any part in the premises. If two notes are secured by mortgage, and I transfer one of them *and the mortgage* to A. as security for the payment of the other, do I not forego my claim to prior or *pro rata* satisfaction out of the premises ?

The stock bond is not for a given sum only, but for that and "any other call ;" the creation of any debt by the directors was "a call," within the terms of the bond. (p. 36.)

These two points are the only ones discussed in the arguments for the demurrants, submitted to me, and I have confined myself to them, without remarking on other points presented by the bill.

C. R. Clifton, in reply.

The first point taken in the demurrer as to the necessity of making additional parties, appeared to be more doubtful, on examination, than at the first thought ; and as great confidence, not only undiminished but much strengthened by subsequent reflection, is entertained as to the second, it will be left for the decision of the Chancellor, without any additional remark, other than this — that the act of 1836

Boisgerard, et al. v. Wall.

applies exclusively to proceedings in a court of law, and cannot be converted into an authority for altering the form and mode of proceeding in this Court. It is true, that, in strictness, the word "complainant" can only apply to a party in a suit in Chancery; but it is better to suppose that the draftsman of the bill was not sufficiently mindful of the terms he employed, than to disregard the general scope and design of the act.

The second point has been carefully reexamined, with all the light shed upon it by the learned counsel of the complainants, but nothing has been found to bring it into question. Indeed, it would be an affectation of courtesy, not to say that the feebleness with which it has been assailed has confirmed my opinion that it is unassailable. I will examine the arguments of the gentleman, and attempt to show that, in thus characterizing them, I do them no injustice.

The articles of association filed with the bill as Exhibit A, contain the terms and conditions of the contract, and the bond and mortgage are instruments therein provided for, and to be drawn in pursuance of these terms and conditions. I have re-read these, and can come to no other conclusion than that the "primary," if not the only, object of the bond and mortgage was, to secure the amount of the stock subscribed; and it is difficult to perceive by what process of just reasoning a different conclusion can be reached.

The 15th article provides for the admission into the company of persons owning no real estate, upon the payment of the amount of stock subscribed for in "gold and silver," without giving any bond and mortgage. The liability of a stockholder coming in under this provision could not have been assigned to Delafield in trust for Boisgerard, under the contract with the latter, although his liability to the creditors of the company was coextensive with their indebtedness; for the reason, that, instead of giving a bond for his stock with mortgage to secure it, he had paid gold and silver for it. The liabilities of those who had given bond and mortgage, to the extent of the bond secured by mortgage, could be transferred, not because they were responsible for all the debts of the company — for, in this respect, there was no difference between the two classes of stockholders — but because they had contracted a specific liability for a definite amount, capable of assignment. What was this specific

Boisgerard, et al. v. Wall.

liability? The bond for the amount of the stock subscribed, secured by mortgage on unincumbered real estate. (See article 2.) When was the bond payable, according to its terms? In 5, 10, and 15 years from the first day of January, 1839. This was the contract. Had it been held by the company instead of being assigned to the complainants, when could payment have been enforced? In 5, 10, and 15 years from 1st January, 1839. Why? Because such were the terms of the contract; and no man, when he condescends on a written contract, is bound further or otherwise than he contracted to be bound. Could the company transfer to the complainants, by said assignment, a right they had not secured to themselves by the contract? They could not; and the record furnishes no evidence they have attempted to do so: if they have, however, they have exceeded their powers, and the defendant has a right to be protected against a construction his contract will not bear.

To secure the capital stock by bond and mortgage, or by payments in gold and silver, was deemed by the company an ample guaranty to those who might become their creditors for any liability the directors were authorized to incur; and hence the 13th article declares, that the issues of said company shall not never exceed the amount of stock secured by the mortgage and the cash actually in the vaults; thereby intending, plainly, that the action of the directors should harmonize with the resources they had provided for in the bonds and mortgages, and cash payments. The 14th article specifies when the stock subscribed for was to be paid, and shows that it was the expectation of the stockholders that the profits of the company would meet these instalments as they respectively became due, and that the bond was only to be looked to to make good any deficit which might happen after such appropriation of the profits. With what propriety, then, can the statement, that the bond and mortgages were given "primarily" to secure the stock subscribed, be controverted?

The counsel on the other side say, "by the terms of the mortgage a creditor might subject the lands *presently* to the payment of his debt; but the company could not proceed until after the first instalment of the bond fell due, or some 'call' had been made

Boisgerard, et al. v. Wall.

on the mortgagor." The first part of this sentence, that, "by the terms of the mortgage a creditor might subject the lands *presently* to the payment of his debt," finds no support in the mortgage itself: there is nothing in it to justify the statement. Its terms are, "if the said Michael Wall, his heirs, &c., shall well and truly pay off and discharge and satisfy the said president and directors and their successors, for the stock subscribed for by the said Michael Wall, at the times and periods when the same shall become due and payable, and well and truly pay off and discharge all the notes, bills, checks, and other liabilities of the said Real Estate Banking Company of Hinds County, then, and from thenceforth, as well this present indenture and the estate hereby granted, as the bond aforesaid, shall cease, determine," &c.

It is admitted by the complainants' counsel, in the above extract, that the *company* could not proceed until after the first instalment of the bond fell due, or some "call" had been made on the mortgagor. The terms of the mortgage show, that no right of *present* satisfaction was conferred on any class of creditors, or on any one whatever; and the only difference between the rights of the company and those of creditors, under the mortgage, is, that the payment of the bond to the company for the stock is "primarily" provided for, but only at the "*times and periods when the same shall become due and payable.*" But if the argument of the counsel be granted, he can gain nothing by it, since he concedes that the company could not proceed until the first instalment of the bond became due; and it is quite clear that the complainants hold under the company, and by the transfer of the bond and the mortgage made to secure it, only succeeded to the rights of the company. The company could assign no right which they did not possess, and it is admitted that *they* "could not proceed until after the first instalment of the bond fell due."

If the company had proceeded on the bond after it fell due, and had foreclosed the mortgage for the amount due on it, and sold the land, any proceeding by a creditor to subject the land afterwards must have been discharged upon its being made known that it had been already sold to pay the stock-bond; and this shows, that the amount of the bond limits the liability of the defendant under the

Boisgerard, et al. v. Wall.

mortgage, and is the measure of the extent of any right to be acquired by its transfer ; and, that whatever may be the recourse of the complainants against the defendant, or his general liability as a member of the company, when they hold under the bond and mortgage they must look to the contract which they contain for their rights, and can neither exceed it or disregard its terms. It is not true, then, that "the lien on the lands was to be coextensive with the general liability of the stockholder, and the condition of the mortgage framed accordingly."

The counsel proceeds : "It was expressly provided (p. 29, art. 23), that the bills, notes, &c. of this company, should be secured by the mortgages. The directors prescribed the form of mortgage as they were authorized to do (p. 26, art. 2), so that the insertion of the 'notes, bills, &c.,' in the condition of the mortgage, was simply a compliance with the letter and spirit of the articles." In this there is a strange misconception of the 23d article. It only provides for the transfer of the mortgaged property and the stock which it covers, and the release from liability of the stockholder transferring, and the assumption, on the part of the person to whom the transfer of the stock and conveyance of the mortgaged premises are made, of the general liability of the company, for its notes, bills, &c., previously incurred ; but does not, by implication or inference, however remote, refer to the point in controversy. The second article is equally misconceived. It is not true, that it authorizes the directors to prescribe a form of the mortgage to secure the payment of the notes, bills, &c., of the company. Its language is: "the payment of the stock, thus subscribed for, shall be secured by *bond* and *mortgage* upon unincumbered real estate, executed by the parties subscribing as above ; the *forms* of which bond and deed of mortgage shall be devised under the superintendence of the president and directors to be hereafter chosen." Here, the sole object is to devise the *form* of the *stock-bond*, and the *form* of a *mortgage* to secure the payment of the stock-bond, and not to devise a form for embracing any other or additional liability. This specific and definite object was to be effected by the bond and mortgage, and the articles of the company do nowhere authorize, permit, or provide, that the president and directors may include in the mortgage any other

liability than the stock-bond ; it is the “ payment of the stock subscribed for,” that is to be secured by bond and mortgage — nothing more : and hence both the “ letter” and “ spirit” of the articles are violated in the form of the mortgage “ devised by the president and directors ” ; but, even with all the advantage of this violation, the complainants cannot disregard the leading object of the bond and mortgage, which was to secure the payment of the amount of stock subscribed, in 5, 10, and 15 years from the 1st day of January, 1839, by falling back upon an incidental one, and thus convert the bond payable in 5, 10, and 15 years, and the mortgage made previously to secure it, into a security payable on demand. This would be a monstrous perversion of the contract, and can never receive the sanction of any judicial tribunal, until it usurps the power, not only to disregard the contract which a party has made, but the much more monstrous power of making a contract for him, and then enforcing it.

The counsel continues : — “ Independently of this general clause for the protection of the creditors, a court of equity would subject these lands presently,” &c.

As to this, it may be observed, that a court of equity will not take jurisdiction of a case, where the remedy at law is undoubted, and that, aside from the bond and the mortgage given to secure it, the defendant, M. Wall, occupies the same relation to these complainants, that a stockholder would occupy, who had given no bond and mortgage, but had paid the amount of his stock in “ gold and silver”; and it seems manifest, that a court of equity would not entertain a bill against such an one, at the instance of these or any other complainants, to enforce his general liability. The extent of the “ general liability” of the stockholders could not be known, at the time the company was formed, at the adoption of the articles of association; but the amount of stock subscribed for by each was definite and fixed ; and as this amount was made the basis of all the transactions of the company, the articles of association limited the mortgage expressly to the stock subscribed. The liability grew out of the articles of association. The mortgage could not limit, nor did it extend, that liability ; nor could it create any new ones ; it only provided a security to meet a specified and limited, known

Boisgerard, et al. v. Wall.

and fixed part of that liability (the stock). The general liability of the stockholder being fully recognized, but unknown in extent, was never intended by the company to be provided for by the mortgage, and in fact was not so provided for.

The counsel on the other side is mistaken in saying that the demurrants admit the nullity of their objection, in taking the position that, before the agreement of the 9th of March, any creditor of the company might have filed a bill to subject the fund or mortgaged premises to sale, &c. ; because "any creditor" must be held to include those only whose debts are due, as no other could proceed to collect ; and if, so far as the bond and mortgage are concerned, these complainants are "creditors" by virtue of the assignment to them of said bond, and the mortgage made to secure it, then their debt was not, and is not due, and they are not embraced by the remark. But that remark was made in the course of an attempt to show, that the bond and mortgage, which, before the agreement of March, 1839, constituted a security to which all creditors, whose debts were due, might have recourse, was by that agreement specially appropriated, and ceased to be a fund to which all the creditors might resort. It was not intended, by that remark, to admit, that before the "9th of March," as a period of time, but before the contract of that date (the debt being due), any creditor might subject it. No omission of counsel can mature a debt, before the time fixed by the party contracting it, and such a construction of the remark in this case, is an (no doubt) unintentional, but total misconception of it.

The counsel seems to convince himself, in the progress of his argument, that his positions are untenable, and by way of saving himself from entire overthrow, falls back, in the conclusion of his argument, upon one, that stress of circumstances of uncontrollable force could alone have induced him to take. He says, "the stock bond is not for a given sum only, but for that and 'any other call'; the creation of any debt by the directors was 'a call,' within the terms of the bond." I shall make no argument, in reply to this; but I shall refute it, by directing the attention of the Chancellor to the terms used in the bond, and the subject-matter of that article, in the articles of association, to which these terms refer.

Boisgerard, et al. v. Wall.

The condition of the bond, after directing the payment of the amount for which it is drawn, in five, ten, and fifteen years, adds, "and shall meet and satisfy any other call that shall be made upon the said Michael Wall, by the said president and directors, in pursuance of the requirements of the said articles of association, at any time, then," &c.

The 7th article of the articles of association is in these words :— "For the purpose of enabling the company to commence immediate operations, the board of directors are hereby authorized and empowered to make a call of not exceeding five per centum of the amount of stock subscribed. Additional calls may be made, from time to time, at the discretion of a majority of two thirds of the directory, until the aggregate amount of such calls required shall be ten per cent. upon the amount subscribed, when all further calls shall cease," &c. The refutation of that suggestion, as to the "call," could not be more complete.

It will not be pretended by any one, that an action at law could be maintained on the bond. Nevertheless, the complainants have averred (p. 20), "that no proceedings at law have been had or instituted for the collection and recovery of the said sum of \$23,929·20, mentioned in the said bond," &c. — apparently implying a belief on the part of the pleader, that the bond was due ; and this, it seems to me, must have been the delusion under which the bill was brought, — and brought, as I think, prematurely.

CHANCELLOR. This bill is filed to foreclose a mortgage, made by the defendant, to the President and Directors of the Real Estate Banking Company of Hinds county, and by them assigned to the complainants. In April, 1838, the defendant, with a great number of other persons, associated themselves in partnership, for the purpose of carrying on the business of private banking in the town of Clinton, in this State. The partnership-stock was to amount to a million of dollars, to be divided into shares of one hundred dollars each, and each partner was to give a bond, for the amount of his stock, payable in five, ten, and fifteen years, to be secured by a mortgage on unencumbered real estate. The defendant took stock, to the amount of \$23,929·20, for which he gave his bond, payable

Boisgerard, et al. v. Wall.

in five, ten, and fifteen years after the 1st January, 1839, and made a mortgage, the purposes of which are stated, in the recital thereof, in these words : "And being desirous of still further securing the payment of said stock subscribed for, as aforesaid, punctually, at the times and periods prescribed in and by said bond and articles of association, and to bind and render himself, his heirs, executors, administrators, and assigns, liable, according to the tenor and effect and true intent and meaning thereof, in conjunction with each and every stockholder of the said capital stock of said Real Estate Banking Company of Hinds county, to all and singular the holders of the notes, bills, checks, and other liabilities, of the said Real Estate Banking Company of Hinds county, now existing, or which may hereafter exist, at any time during the period of fifteen years, the time prescribed in the bond and articles of association aforesaid, of said Real Estate Banking Company of Hinds county ;" and then proceeds thus : "Now, therefore, this indenture witnesseth," &c. The conditions of the deed of mortgage are thus stated : "If the said Michael Wall, his heirs, executors, or administrators, shall well and truly pay off, discharge, and satisfy the bond aforesaid, signed, sealed, and delivered by said Michael Wall, as aforesaid, and well and truly pay and satisfy the said president, directors, and their successors, as aforesaid, for the stock subscribed by the said Michael Wall, at the times and periods when the same shall become due and payable, and well and truly pay off and discharge all the notes, bills, checks, and other liabilities, of the said Real Estate Banking Company of Hinds county, then and from thenceforth, as well this present indenture, and the estate hereby granted, as the bond aforesaid, shall cease, determine, and become absolutely null and void."

In March, 1839, the company, having borrowed \$300,000 from the complainants, transferred to them this and other mortgages of like character, as security for the repayment of the sum so borrowed. The defendants have demurred to the bill, and assigned two causes of demurrer. 1. It is insisted that the other partners or stockholders should all have been made parties defendant to this bill. The general rule in equity certainly is, that all persons in interest must be made parties. But the application of the rule to particular cases is always subject to the exercise of a sound discretion, and may be

modified, or partially dispensed with, as the ends of justice and the exigency of the case may require. The Court will not so apply the rule as to defeat the purposes for which it was instituted; we hence find in practice, that many exceptions and restrictions to the generality of the rule have been established. Among the most obvious of these is the case where the parties are so numerous as to render it inconvenient, if not impracticable, to bring them all before the Court, without incurring the hazard of great delay and unnecessary expense. In such case, if the Court can render complete justice between the parties before it, without directly affecting the interest of others, it may proceed at once to a decree, notwithstanding the objection for want of parties. In this case, it is alleged that there were upwards of a hundred partners or stockholders in this company; that many of them are dead, leaving numerous representatives. To require that all the stockholders, or their representatives, should be before the Court, would subject the case to interminable delay, arising from the death of parties, and other causes, incident to the multiplicity of persons concerned. Story's Eq. Pl. 104, 105. Moreover, I do not perceive that the other stockholders have any direct interest in the result of this suit. It is a proceeding *in rem*, upon the separate mortgage, made on the separate liability of this defendant. I think, then, that there is nothing in this ground of the demurrer. The next and principal ground relied on is, that the mortgage must be construed as being intended only to secure and cover the amount of the bond given for stock; and as the first instalment under the bond had not become due, when the bill was filed, it is hence insisted that the suit was prematurely brought.

It thus becomes necessary for me to decide, what, in point of law, is the true interpretation of this mortgage. The terms of the articles of association are referred to, to show that nothing more was contemplated or required at the hands of each stockholder, than that he should give a bond and mortgage, to secure the amount of stock he had taken. That is true, but this did not necessarily prevent the company from afterwards making the mortgage sufficiently broad and comprehensive, to embrace those who might become its creditors, either by a loan of money, or by the receipt of its bills. We are apt to confuse ourselves, by calling this association a

bank, and by judging of its rights, powers, and liabilities, by those rules which regulate a banking corporation. Banking, to be sure, was the purpose for which it was formed, but still it has attached to it all the incidents, powers, attributes, and liabilities of a private partnership : it is, indeed, nothing more in fact or in law. It is true, that, to ascertain the powers, rights, and interests of partners as between themselves, you must look to the articles of partnership. But, as to third persons, these articles may be qualified, superseded, or waived, by the conduct of the partners, however positive their provisions may be ; and where they have acted contrary to, or beyond, the terms of the original articles, they will be held to have adopted such new terms, and qualifications, as may correspond with their new line of conduct. *Jackson v. Sedgwick*, 1 Swans. Rep. 469 ; *Const v. Harris*, 1 Turner & Russel, 523; Story on Part. 288. If then any change was made, as to what should be the *nature* and extent of the liabilities of each partner, and the form of security to be given therefor, the validity of that change cannot be questioned, because of its want of conformity to the original articles, provided it has been acted upon as a rule of partnership conduct ; and this brings me back to the mortgage itself. Has such change been actually made ? It is to be observed, that this mortgage is made by one of the partners, to the partnership itself, and whatever it contains, must, therefore, be presumed to have had the partnership sanction, and to be in accordance with the partnership articles and purposes.

What, then, are the purposes and conditions of the mortgage ? I have already shown, that, according to the recital of the mortgage, its purpose was to give security for the payment of the stock bond, "*and to bind and render himself liable*" to all who then were, or might become, the creditors of the company, during the period of fifteen years. It is this somewhat awkward phraseology, upon which the apparent difficulty arises. The inquiry is, in what did he "*bind and render himself liable*" to creditors ? It surely was not thought necessary, to render a partner *liable* for the partnership debts, that there should be an express covenant to that effect ; such liability would follow as a legal consequence from his partnership relation. I must presume, that something more than a recognition

Boisgerard, et al. v. Wall.

of this general liability was intended by the mortgage, because that would have been idle and useless. I cannot resist the conclusion, that the intent and meaning of the phrase, "bind and render himself liable" to creditors, meant, liable on the mortgage, according to its terms. But it seems to me, that if any doubt could exist as to the meaning of the language employed in the recital of the mortgage, that doubt is removed, and the whole matter made clear, by the explicit terms of the condition. *That condition is, that if the mortgagor shall well and truly pay his stock bond, at such "*times*" as it becomes due and payable, "and well and truly pay off and discharge all the notes, bills, checks, and other liabilities of the said Real Estate Banking Company of Hinds county," then the mortgage deed is to become null and void. Now if the bill-holders and other creditors have no claim under the mortgage upon the mortgage property, why not cancel the mortgage so soon as the stock bond was paid off? But this is not the only condition; it is only to be cancelled, when all the debts of the partnership are paid; thus showing, as I conceive, that the mortgage was intended equally for the security of the partners themselves, and of those who might become its creditors. This construction appears to me to be perfectly consonant to the ends and purposes of the association. What is its nature, and what were its objects? It was formed for the purposes of private banking; issuing bills to circulate as money, and dealing in exchange, would of course constitute its leading business. Each individual who came into the concern, was to put something, in the shape of capital, into the common stock. Instead of complying with the ancient, and certainly the more legitimate mode of banking, by putting in so much money, they agree to adopt the more *modern usage* of substituting the promissory notes of the stockholders, payable in long instalments, as the capital stock, upon which they would operate. It was, therefore, a matter of the utmost importance to stockholders, as among themselves, that they should have some security, that this stock would be paid in; and as the stock was only to be paid in at intervals of five, ten, and fifteen years, it was no less important, that a prompt and stable security should be created, upon the faith of which their bank notes might be readily taken by the public, and circulated as money.

Boisgerard, et al. v. Wall.

The mortgage, then, in the form in which it presents itself, was contrived for the attainment of these ends ; it was made, as it purports on its face, for the double purpose of securing the payment of the stock, which each one agreed to put into the common fund ; and also to give present and available security to any one who might become the creditor of the company, either by advancing it money to bank upon, or by receiving the notes or bills it might issue. It is no objection to a mortgage, that it is made to secure future advances, or to cover future and anticipated liabilities. *United States v. Hoe, 3 Cranch, Rep. 73 ; Hendricks v. Robinson, 2 John. Ch. Rep. 283.*

Let us see in what attitude the construction contended for by the defendants would place the creditors of the company. It must be recollectcd, that all the partnership property consisted in these mortgages. The company is not the owner of the lands embraced in the mortgages, but the *mere mortgagees*. What then would be the condition of one of its creditors, who had obtained his judgment at law, as it regards the partnership property ? He could not reach the land itself embraced in the mortgages, nor could he reach the qualified interest which the company has in them, because the interest of a mere mortgagee, before foreclosure, is in the nature of a *chase in action*, and cannot therefore be seized and sold under an execution at law. *Jackson v. Willard, 4 John Rep. 41.*

Let us see if his condition would be any better in equity. It is true, that creditors have, in equity, a *quasi lien* upon the partnership property, for the payment of their debts ; but this equity is to be worked out, through the medium of the equity of the partners themselves as against each other. *Ex parte Ruffin, 6 Ves. 119, 126, 127.* The creditors, then, would have no more summary remedy on the mortgages, than the partners themselves could have ; they would consequently have to wait five, ten, and fifteen years, before the mortgage could be finally foreclosed as to all the instalments. This construction would prove an attempt by the company, by means of an arrangement among themselves, to lock up the partnership property, and place it beyond the reach of their creditors, for a long series of years. It surely was not the purpose of the company to compel any one, who might become the

Boisgerard, et al. v. Wall.

holder of one of their five dollar bills, payable on demand, to wait five, ten, or fifteen years for its payment, by telling him that the mortgages only required that the stock should be paid in at those intervals ; and that no other security was provided for its payment. Such an arrangement would, it seems to me, have been a fraud upon the public. But the high character of the gentlemen concerned in it, utterly forbids the idea, that any such thing was in contemplation ; and I am gratified to find, from the mortgage itself, that such an inference is fully repelled. I have dwelt longer upon this point of the demurrer, than I should have thought it necessary, but for the ingenious and earnest manner in which it has been pressed by the learned counsel for the defendant. I wished to present fully the reasons which led my mind to dissent from the conclusions, which seemed forcible and convincing to the mind of counsel.

Let the demurrer be overruled.

DECEMBER TERM, 1843.

HENRY SMITH, et al. v. ROBERT J. WALKER, et al.

A prior owner of a note, who, while such, obtained judgment at law against the maker of the note, and afterwards, and while the note was lost, transferred the contents of the note, and the right to control its proceeds, has the legal title to the note, and is a proper party to a bill filed to recover the amount of the lost note from the indorsers.

Where a bill is filed to recover the amount of a lost note, it is not necessary to have tendered indemnity before the bill was filed, or to the parties themselves; it is sufficient if it is offered by the bill.

A court of chancery has no jurisdiction of a bill upon a lost note, unless indemnity is offered upon the face of the bill.

Before a party can come into equity, to recover upon a lost note, he must make affidavit of its loss.

A court of equity has jurisdiction of a bill filed to recover from the indorsers of a lost note, the amount of the note; the basis of equity jurisdiction in such cases being the power of the court to compel indemnity.

THE bill in this case was filed by Henry Smith, John L. Smith, and John Brown, complainants, against Robert J. Walker and Thomas Barnard. It averred, that M'Neill, Wilkinson, & Co., had made their promissory note payable to the order of Robert J. Walker, and by him and Thomas Barnard indorsed and delivered to the complainant, Henry Smith; that Henry Smith sued the makers of the note, in the county of Warren in this State, where they resided, and obtained a judgment at law against James J. Chewning, one of the makers; that the indorsers lived in Adams county in this State; that the note was withdrawn from the papers of the suit in Warren, and sent to Adams, and was lost in the transmission, never having reached its destination; that while it was so lost, the complainant, Henry Smith, by an agreement and contract with the other complainants, transferred to them the contents of the note, and the right to control its proceeds; the bill averred, that the note had been regularly protested for nonpayment, and notices thereby given, and fully, by its allegations, fixed the liability of the defendants: it is also averred, that the makers of the note had given the indorsers indemnity, and called upon them to disclose the nature and amount of it. It is not deemed necessary to notice

Smith, et al. v. Walker, et al.

at length these parts of the bill, as the demurrer did not extend to them.

The bill contained a formal offer to indemnify the defendants against the subsequent reappearance of the note.

An affidavit of the loss of the note was also appended to the bill.

The defendant, Robert J. Walker, appeared in proper person, and demurred to the bill for five assigned causes, which are not repeated here, as they are noticed *seriatim* in the opinion of the Chancellor.

Smedes and *Marshall*, in behalf of the bill.

1. On the question of jurisdiction of this Court in cases of lost bill or note, the following authorities are decisive of the point.

Fisher v. Mershon, 3 Bibb. 527, *West v. Patton*, Lit. Sel. Cases, 406; *Anon.* 3 Atk. 17; Mit. Eq. Plea, 112; Fon. Eq. 1, 17 Ch. 1, § 3; *Jeremy on Chancery Jurisdiction*, 362; Chit. on Bills, 202; *Pierson v. Hutchinson*, 2 Camp. 211; *Poole v. Smith*, 1 Holt, 144, 3 Eng. Com. Law Rep. 55; 2 Robinson's Pract. 40; 1 Story, Eq. 103.

2. As to the indemnity, it is sufficient if it is offered with the bill. *Walmsley v. Child*, 1 Ves. 344; *Bromley v. Holland*, 7 Ves. 20; 1 Story, Eq. 102; Chit. on Bills, 290.

3. Henry Smith was a proper party. The legal title to the note was in him.

The rule as to proper parties is, that all persons ought to be made parties before the court, who are necessary to make the determination complete, and to quiet the question; Lord Hardwicke, in *Poor v. Clarke*, 2 Atk. R. 515.

An obligee of a bond who has assigned it absolutely, and claimed no interest in it, in a suit brought by the assignee against the obligor, may be made a party. *Brace v. Harrington*, 2 Atk. 235.

"In cases where an assignment does not pass the legal title, but only the equitable title to the property, as for example the assignment of a chose in action, it is usual, if not indispensable, to make the assignor a party to the suit." Story, Plead. 147, §

Smith, et al. v. Walker, et al.

153; Mit. Eq. Pl. 179; *Ray v. Fenwick*, 3 Bro. Ch. R. 25; Story, Eq. Pl. 77, § 75.

He is a necessary party to give indemnity.

4. But whether he be a necessary party or not, his being made so, is not ground for demurrer; "the joinder or non-joinder of mere nominal or formal parties, will not ordinarily be allowed by the court, as a valid objection to proceedings under the bill." Story, Eq. Pl. 198, § 229; Calvert on Parties, 239; *Ryan v. Anderson*, 3 Mad. R. 176.

In fact, in a late case in England, that of *Messenger v. Hammond*, in the Eng. Jur. for 1839, p. 98, and cited in Story, Eq. Pl. 149, it was decided, that the assignor of a debt must be a party; that the assignee could not sue in his own name.

5. We admit an affidavit to be necessary; one is filed with the bill.

CHANCELLOR. This bill is filed against the accommodation indorsers of a lost note, to recover of them its amount; and has been demurred to. The first ground of demurrer is:

1. That Henry Smith, one of the complainants, is improperly joined, as such.

It may be remarked as to that objection, that this complainant, whose joinder is objected to, was at one time, prior to the filing of the bill, the holder and owner of the note in controversy, and while such, obtained a judgment at law upon it, against the maker of the note; that after this judgment was obtained, the note was withdrawn from the suit at law, and transmitted for the purpose of suit against other parties to the note to a distant county, and was, in the course of transmission, accidentally lost; that, while the note was thus lost, by an agreement between the complainant, Henry Smith and the other complainants, Henry Smith assigned to them the contents of the note, and the right to control its proceeds; the note was not then in the possession of either party, and of course no delivery of it took place; Henry Smith was, therefore, still the holder of the legal title, the other complainants had a mere equity in the note, which was but a chose in action, and of course all they obtained by the transfer was a mere right in equity to its proceeds.

Henry Smith was, therefore, a proper party, either plaintiff or defendant ; where a party has clearly an interest in the matter in controversy, it is not in equity generally a matter of materiality, whether he be made plaintiff or defendant. I think in this case, the complainant is properly made a party as such.

The second cause of demurrer assigned is, that the complainants had not, before the filing of the bill, offered to give the defendants indemnity against a suit by a future holder of the note.

It seems to me, that this objection is based upon a total misconception of what was necessary in coming into this Court to recover upon a lost note. It is not necessary in such a case to tender indemnity before the bill is filed, or to tender it directly to the parties themselves. It is sufficient, if the bill offered to give indemnity when required, which is only done at the final decree, and in fact forms a part of it.

It is, I find, upon looking into the authorities, necessary, as preliminary to this Court's having jurisdiction of a case of this kind, that the complainants, upon the face of their bill, offer to give such indemnity as may be required ; the bill in this case does contain this offer, and I must, therefore, overrule this ground of demurrer.

The third cause of demurrer assigned is, that no proof of the loss of the note accompanies the bill.

I cannot perceive the precise meaning of this ground of objection to the bill ; if the defendant intends by it, that there is no affidavit of the loss of the note, he is within the rule upon that subject, but the answer to that objection is, that it has no foundation in fact ; there is an affidavit appended to the bill, complying fully with the requisition of the law.

The fourth cause of demurrer is, that this Court has no jurisdiction of the case.

A reference to the authorities show these distinctions : if the note was negotiated after it is due, or if it was not upon its face negotiable, the party alleging the loss might sue at law ; because, in either of these events, the maker could defend in any action that might be subsequently brought against him, and set up any equities that might exist between him and the lawful owner of the note, any payment he might have made him, and thereby could defeat the person into whose hands it might pass, and who might attempt

Smith, et al. v. Walker, et al.

to enforce its collection ; because a party taking a note under the circumstances I have enumerated, takes it subject, in the language of the commercial law, to the equities of the maker, as against the prior holder.

In England, the only ground for coming into equity to recover for a lost note, was, that the defendant could by that means obtain adequate indemnity ; a court of law has no power to give indemnity, a court of chancery can compel it ; and this seems to be the foundation for chancery jurisdiction in such cases. There can be in this case, therefore, no doubt whatever of the jurisdiction of the Court.

The *fifth* objection is a general one ; of irregularity, &c., in the construction of the bill.

I have examined the bill ; it is technical, and well drawn, sufficient both in its averments and substance to entitle the parties complainant to the decree they ask.

The demurrer must be overruled, and the defendant allowed ninety days in which to answer.

DECEMBER TERM, 1843.

ADAM L. BINGAMAN v. R. C. HYATT, et al.

A judgment in this State, of older date than the *registration* of a mortgage, though junior to its *execution*, will be a prior lien upon the land embraced in the mortgage.

A levy upon personal property sufficient to satisfy the judgment, is, while the levy subsists, a satisfaction of the judgment, and a sale of *other* property than that embraced in the levy, by another execution on the same judgment, while the first levy remains undischarged, passes no title.

An order of a circuit court, quashing a forthcoming bond, at a term subsequent to the return term of the bond, is a mere nullity.

The execution of a statutory forthcoming bond, does not discharge the levy of the execution, under which it is taken; that levy continues in full force until the bond is forfeited, and acquires the force and effect of a judgment.

An irregular forthcoming bond, incapable of forfeiture, being taken, does not discharge the levy of the execution, and upon the quashing such a bond, the original levy remains in full force.

Upon an execution issuing upon a judgment, a levy was made, and an illegal forthcoming bond was given, which was afterwards quashed; another execution issued upon the original judgment, and property was sold under it; held, that the purchaser acquired no title; the judgment being in law satisfied by the first levy.

A mere stranger, without interest in the matters in controversy, has no right to question the validity of the title to the property, as between the other parties to the suit.

If the description of land in a deed, though not certain in itself, points to anything which will give exact information of the locality and boundary of the premises, it is sufficient to charge a subsequent purchaser with notice.

A description in the following words: "lying and being in the county of Yazoo, and State of Mississippi, situate on Short Creek, about three miles from Manchester, in township eleven, range two, west, in sections eight, nine, ten, and fifteen, containing about two thousand acres;" held, to be sufficient to affect future purchasers with notice.

Quare. Where a sheriff levies upon and sells more land than is necessary, to satisfy the execution, where the land is capable of division, is such a sale void?

THE bill in this case, was filed to foreclose a mortgage executed by one Jacob B. Warnack in his lifetime, on the 5th day of April, 1836, to the complainant, Adam L. Bingaman, but not recorded until the 26th of September, 1836, conveying to said complainant "certain land lying and being in the county of Yazoo and State of Mississippi, situate on Short Creek, about three miles from Manchester, in township eleven, range two, west, and in sections eight, nine, ten, fourteen, and fifteen, containing about two thousand acres," and

Bingaman v. Hyatt, et al.

appurtenances, &c., and some sixteen slaves, to secure complainant as surety as joint accommodation drawer to a bill of exchange with said Jacob B. Warmack, for said Jacob B. Warmack in his lifetime, since deceased, in favor of one Thomas B. Poindexter, which bill was accepted by Buckner, Stanton, & Co., payable 12 months from date, dated 6th April, 1836, for \$6000; which bill of exchange complainant Bingaman states that he took up and paid himself, but that it has been lost or destroyed.

King, Miller, & Co. obtained a judgment in Hinds Circuit Court against Jacob B. Warmack in his lifetime, on the 27th day of May, 1836, for \$160, and costs of suit. Execution issued on this judgment and was bonded, after the death of said Jacob B. Warmack, by Martha Warmack, Phil. Hoff, and W. A. Elamee, giving their forthcoming bond, which was forfeited and returned 7th November, 1836. Execution issued on said forfeited forthcoming bond, and was returned "no property." Afterwards, on the — day of June, A. D. 1841, at the June term of Hinds Circuit Court, 1841, the said forthcoming bond was, on motion, by the judgment of the Court quashed, as appears by the record of the judgment and proceedings of said Circuit Court in the case, which is made an exhibit to the defendant Hyatt's answer, and referred to as an exhibit in the answer of the defendant Banks.

The plaintiffs in this judgment, King, Miller, & Co., afterwards sued out a *scire facias* to revive the original judgment against Martha Taylor and Lewis L. Taylor, guardians of Letitia Warmack, minor, heir of said Jacob B. Warmack, deceased, and said Letitia Warmack, returnable to 3d Monday of June, 1841; on the return of which, to wit: on the 23d day of July, A. D. 1841, a judgment reviving said original judgment, and awarding execution against the heirs of said Jacob B. Warmack, was rendered by said Circuit Court of Hinds.

In pursuance of said judgment of revival, on the 26th July, 1841, an execution issued on said original judgment against said Lewis L. Taylor, and Martha, his wife, and Letitia Warmack, minor heir of Jacob B. Warmack, deceased.

A transcript of the original judgment, as revived, was filed in the Circuit Court Clerk's office of Yazoo county, on the 28th July, 1841.

Bingaman v. Hyatt, et al.

The execution on the original judgment after revival was levied on the following lands, to wit : E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$; E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$; N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ in section 10; S. $\frac{1}{2}$ and W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, and E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ in section 11; and W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, and W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, and N. E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ in section 12; and W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 13; and N. $\frac{1}{2}$ of section 14; and E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of section 15, all in township 11, range 2, west; and the N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 33, township 11, range 1, west; and W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, and E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 11, township 11, range 2, west — containing in all fifteen hundred and sixty $\frac{66}{100}$ acres, more or less, as the property of J. B. Warmack in his lifetime, and now belonging to his heirs, which were sold at public sale by the coroner of Yazoo county (there being at that time no sheriff), and bought by Richard C. Hyatt, A. C. Clark, and Jane Banks, jointly.

The said coroner, by regular deed of conveyance conveyed these lands to the purchasers ; that is to say : one fourth of the said lands to the defendant Hyatt, and the remaining three fourths to said Clark and Banks in equal portions ; which deed was regularly acknowledged and recorded.

Clark afterwards, by deed duly executed, delivered, acknowledged, and recorded, conveyed her interest in the lands to the defendant Banks.

The complainant in his bill alleges, that the lands so levied on and sold by the coroner of Yazoo, are part and parcel of the lands conveyed to him in said mortgage, and that the original judgment of King, Miller, & Co. has been satisfied by the forfeiture of said forthcoming bond.

The answer of defendant Banks denies that the lands bought as above stated by said Hyatt, Clark, and herself, are described in said mortgage or are conveyed by said mortgage, and alleges that said mortgage is void as a conveyance of lands, from its ambiguity and uncertainty of description.

A transcript of the judgment on said forthcoming bond, reciting said original judgment, was filed in the Circuit Court Clerk's office of Yazoo county, on the — day of June, 1841.

By agreement of counsel, to prevent the trouble and expense of

Bingaman v. Hyatt, et al.

proof, the execution of the mortgage, the bill of exchange, its loss, and its nonpayment, are admitted : and the case was submitted to the Chancellor upon the pleadings and this agreement.

Wilkinson and Miles, for complainants.

The facts admitted leave the following questions to be determined : —

1. Was the judgment of King, Miller, & Co. a subsisting lien upon the land ?

We respectfully insist that it was not. The abstract of the original judgment and proceedings, filed in Yazoo county, on the 18th of June, 1841, shows that a forthcoming bond had been given and forfeited on the first Monday of November, A. D. 1836. That was subsequent to the time complainants' mortgage was filed for record. This was all the notice the defendants had of the judgment, at the time of their purchase. Of course, then, according to their then understanding, they purchased nothing but the equity of redemption. That we are willing they shall have.

It is now insisted, however, that the forthcoming bond was void ; and that it has subsequently been quashed by the Hinds Court. To the order of the Court, quashing the bond, we have simply to say, that it was void, for want of power in the Court to make it. See 4 How. Rep. 363. The motion to quash, in this case, was made long after the return term had passed. And to that ground of defence which rests itself upon the voidness of the bond, we need only remark, that if that be the case, then the levy first made is, and was, at the time the land was sold, in full force ; and, upon principles familiar to every lawyer, was a *quasi* satisfaction of the judgment. No other levy could be made, until the first one made had, in some way, been disposed of. 5 How. Rep. 629.

2. Is the mortgage void, for vagueness and ambiguity in describing the land ? It certainly is not, and the authorities cited by defendants' counsel sustain us in this position.

That a conveyance of land may be void, for vagueness and ambiguity, no one will doubt. But in order to make it void, the description must be so vague, as to preclude the possibility of identifying the land intended to be conveyed by parol evidence, or other

Bingaman v. Hyatt, et al.

means. Now, it surely cannot be contended, that when the county in which the land is situated is named, and the particular sections and township are numbered and designated in the conveyance, that the deed is void for ambiguity! Why, is not such a conveyance nearly as explicit as language can make it? What more would any surveyor want, than the description in the mortgage in this case, by which to make a survey?

A decree of foreclosure is asked, and confidently expected.

Battaile, Montgomery, and Boyd, for defendants.

The lands conveyed in the mortgage from Jacob B. Warmack in his lifetime to the complainant, if any are conveyed by it, are described, if described at all, as "certain land lying and being in the county of Yazoo and State of Mississippi, situate on Short Creek, about three miles of Manchester, in township eleven, range two, west, and in sections eight, nine, ten, fourteen, and fifteen, containing about two thousand acres," &c. Admitting, for the sake of the argument, that the complainant's mortgage is a valid and subsisting incumbrance upon the lands in controversy, the sale by the coroner of Yazoo to Hyatt, Clark, and Banks, was certainly legal and regular, and vested a good title in them to the equity of redemption in the lands in controversy, sold by said coroner under the execution on the judgment of *King, Miller, & Co. v. Jacob B. Warmack's heirs*, and by him regularly conveyed to the purchasers, Hyatt, Clark, and Banks. The objection to the title of defendants in complainant's bill, upon the ground of the forthcoming bond's being a satisfaction of the original judgment under which, as revived, the said Hyatt, Clark, and Banks bought, falls to the ground, since the fact is disclosed in the record of the judgment and proceedings thereupon, a certified transcript of which is filed as exhibit, and made by defendant Hyatt a part of his answer, as also by defendant Banks a part of her answer, and alleged by said defendant Banks in her answer as amended, that said forthcoming bond was, on motion by the judgment of Hinds Circuit Court, quashed: thereby leaving the original judgment in full force and unsatisfied at the time of its revival and of said sale. The transcript of the judgment on the forthcoming bond, reciting the original judgment, filed in the

Bingaman v. Hyatt, et al.

Circuit Court clerk's office of Yazoo county before the 1st day of July, 1841, as required by the act of 1841 with regard to the liens of judgments, continued the lien of said original judgment from its date, May, 1836, long before the record of said mortgage, up to the time of sale. The doctrine that a levy of an execution, on sufficient personal property, is a satisfaction, does not apply to this case, because the forthcoming bond is illegal and void ; of course, the execution which emanated on it was illegal and void ; and the levy of the execution on the original judgment on sufficient personal property, was not, in this case, a satisfaction, because the levy was disposed of in due course of law, unless the defendants in the judgment are to be allowed to take advantage of their own wrong, to wit, the giving of an illegal and insufficient forthcoming bond, a principle which this Court will not tolerate ; and because the property levied on was restored on the giving of the forthcoming bond. But even if the original judgment was satisfied, if the purchasers at the coroner's sale had no notice of that fact, the sale was valid, and Hyatt, Clark, and Banks were *bona fide* purchasers. See 3 How. R. p. 69 ; 1 Cow. 622.

The mortgage purports to convey land to the amount or quantity of 2000 acres, in five different sections, viz. eight, nine, ten, fourteen and fifteen. The coroner's deed purports to convey 1560⁶⁶/₁₀₀ acres. A section contains 640 acres, and five sections 3200 acres. So that Warmack might have mortgaged 2000 acres in the said sections, and yet have had 1200 acres in the same sections unencumbered. And if the mortgagee gets 2000 acres out of the five sections, what right has he to claim the remaining 1200 acres, which have been levied on and sold by the coroner to Hyatt, Clark, and Banks. The mortgage does not call for any particularly designated 2000 acres, out of the 3200 acres contained in the five sections. There is no proof but that Warmack, in his lifetime, owned the whole five sections, and died seised of the same. It is, that the bill alleges, that the land conveyed by the coroner to Hyatt, Clark, and Banks, is part of the land conveyed in the mortgage ; but there are no calls in the mortgage or description of premises, or other proof, to prove this.

His Honor the Chancellor will also observe, that the greater part

Bingaman v. Hyatt, et al.

of the land, described in the coroner's deed to Hyatt, Clark, and Banks, lies in sections eleven, twelve, thirteen, and thirty-three; different sections from those named in said mortgage, which are sections eight, nine, ten, fourteen, and fifteen. Of course, even if a decree of foreclosure is made, it cannot embrace any land, but such as is in the last-named sections.

But it is utterly denied by defendants, that the mortgage is a valid and subsisting incumbrance. The defendants farther contend, that they have a clear legal and equitable title, also, to such lands described in the coroner's deed, as lie in the sections named in the mortgage, not only as purchasers under a judgment of older date than that of the record of the mortgage, but, they allege, because said land is not legally described or conveyed by said mortgage; for the reason, that said mortgage is void as a conveyance of lands, from its ambiguity and uncertainty of description. In deeds or grants, there must be a certain description of the lands or thing granted. 1 Tomlin's Law Dict., Title *Description*, p. 551; 1 Sheppard's Touchstone, 245 to 251; 3 How. R. 231; 18 John. Rep. 107; 4 Kent, 466, 467; 5 Wheat. 359.

A patent or apparent ambiguity cannot be explained by parol evidence. 2 Stark. Ev. 546, 547.

A patent ambiguity renders the deed void.

There is, undoubtedly, a patent ambiguity in this mortgage, which no construction can cure; and, therefore, we say it is void. 1 Sug. on Ven. (2 vols. in one), p. 183.

Even, however, if the mortgage is not thought to be void, it is insisted, that the vagueness, ambiguity, and insufficiency of description of what lands were intended to be granted, are too great to entitle the mortgagee to the legal priority or equity resulting from the constructive notice of registry against *bona fide* subsequent purchasers for valuable consideration.

The registry of a mortgage is said to be notice to subsequent purchasers. 1 John. Ch. R. 298. But notice of a deed is only notice of its contents. 2 Powell on Mortgages, 563, Notes F and I. And if those contents are not of legal sufficiency, there is not such notice as either equity or the statute requires. Implied notice of a title conveyed, must not only be probable, but necessary and unques-

Bingham v. Hyatt, et al.

tionable inference from the contents of the conveyance itself. A notice, merely to put the party on inquiry, is not sufficient to break in upon the registry act. 2 John. Ch. R. 182. Equity gives no assistance against a purchaser for a valuable consideration without notice. 1 John. Ch. R. 300. The ground on which a purchaser is postponed in equity is, that the taking the legal estate after notice of a prior purchase or equity, makes the party a *mala-fide* purchaser, and amounts to a fraud. "In order to fix the fraud, however, the proof of notice must be clear; if it be merely doubtful, a presumption of fraud will not take place." 6 Munf. R. 42; 1 Story's Eq. 390, 391, 392.

An unauthorized registry is not notice. 18 John. R. 544.

The registry of a deed, defectively proved or acknowledged, is not constructive notice to a subsequent purchaser. 2 Binney, 40; 2 Root, 338.

The registry of a mortgage is notice only to the extent of the sum specified in the registry. 1 John. Ch. R. 297; 7 Id. 14.

CHANCELLOR. This is a bill to foreclose a mortgage, given by one Jacob B. Warmack, now deceased, to the complainant, dated the 8th of April, 1836, conveying certain lands in the county of Yazoo, by way of indemnity, against the liability which the complainant had incurred, as the accommodation indorser of Warmack, on a certain bill of exchange. The bill alleges, and the agreement of counsel admits, that the bill of exchange was taken up and paid by the complainant; and thus his right to a foreclosure, as against the mortgagor, became complete and perfect. The defendants, however, set up claim to the mortgage premises, as purchasers, under a judgment rendered against the mortgagor, after the date of the mortgage, but before the same was recorded. By the statutes of this State, a judgment is a lien upon the property, both real and personal of the defendant, from its date; but a mortgage takes effect only, as against creditors, from the date of its registration. The judgment, under which the defendants claim, being of older date than the registration of the mortgage, must of course overreach it, unless by the subsequent proceedings under that judgment its lien became extinguished and discharged. **Ic**

Bingaman v. Hyatt, et al.

appears that an execution of *fieri facias*, of older date than the one under which the defendants purchased, had been sued out and levied upon personal property, sufficient to satisfy the amount of the judgment. A forthcoming bond was thereupon given, which was afterwards returned "forfeited," according to the provisions of the statute upon that subject. An execution issued upon this bond, which was superseded; and at a subsequent term of the Court, from which it issued, both the execution and bond were quashed and set aside. A new execution was then issued on the original judgments, under which the defendants purchased the land in controversy. Whether the prior proceedings had the effect of discharging the lien of the judgment, or of restoring it to its original vigor, is the main point for decision. I much doubt whether the order of the Circuit Court, quashing the forthcoming bond, is not to be regarded as a mere nullity. The term of the Court at which the bond became a judgment, by operation of the statute, having elapsed, that Court had not, I apprehend, any more power to revise or set aside that judgment, than it would have had to set aside its own judgment, formally rendered at a preceding term. This is the view which I infer the Supreme Court took of the question, in the case of *Wanser v. Barker* (4 How. Rep. 363), when it declared that a motion to quash a forthcoming bond could not be entertained, after the term at which it became forfeited had elapsed. If then the order of the Circuit Court, in quashing the bond is void, as being *coram non judice*, the result is, that that bond is still in force; and according to the uniform decisions in this State, it operated an extinguishment of the original judgment, from the moment the forfeiture took place; and, as a consequence, gave priority to the mortgage, which was registered before the date of such forfeiture. But whether this view of the case be correct or not, still I apprehend that the original judgment itself must, in law, be regarded as satisfied, at the time of the sale under it to the defendants. A levy upon personal property, sufficient to satisfy the judgment, appears to have been made on a prior execution, and a bond given for its delivery on the day of sale. If then it be true, as urged by the defendants, that this bond was rightfully quashed as a mere nullity, the case would stand as though no such

Bingaman v. Hyatt, et al.

bond had ever been given, leaving the levy under the execution in full force, and the property liable to be seized and sold under a *venditioni exponas*. The levy of an execution is not discharged even by taking a regular statutory bond, as is evidenced by the very terms and conditions of such bond. The levy continues in force until the bond is forfeited, and has "the force and effect of a judgment;" and if an *irregular* bond, or one not in conformity with the statute, be taken, it is clear that it could never have "the force and effect of a judgment," and therefore that the event could never happen, upon which the levy becomes discharged. In such case, the plaintiff in the original judgment would have a right to regard the levy as still subsisting, and to call for a *venditioni exponas* to enforce it. The sheriff has no authority to take any other bond, than that prescribed by the statute, and if he does, the plaintiff in execution is not bound by it. A levy once made, must remain in force, until legally discharged; an illegal bond could not have that effect. From this view of the case, it appears that at the time when the mortgage was registered, and at the time when the defendants purchased the land, under the judgment against the mortgagor, there was still subsisting and undisposed of, a prior levy on sufficient personal property, to satisfy that judgment. This levy, upon well settled and familiar principles of law, operated an extinguishment of the judgment. From the moment it was made, the *general* lien of the judgment ceased to operate upon the other property of the defendant in the execution, and attached specifically upon the property levied on. (*Ex parte Lawrence*, 4 Cow. R. 417.)

The case of *Jackson v. Bowen and Neff* (7 Cow. R. 13) is strikingly analogous in its features to the one before me. It was a contest between a purchaser under a mortgage with power of sale, and a purchaser under a judgment against the mortgagor. It was urged that the private sale under the mortgage was void, because that form of foreclosure is not authorized by the laws of New York, where there is a junior incumbrance, and that the judgment under which the plaintiff claimed was in force at the time of such sale. It appeared, however, that at the time of the sale under the mortgage, a levy had been made under the judgment on personal property sufficient to discharge it; but the plaintiff in execution

Bingaman v. Hyatt, et al.

had ordered it to be returned unsatisfied, and afterwards sued out another, and levied it on, and sold the land, previously sold under the mortgage. The Court held, that no title passed under this sale; that the prior levy was an extinguishment of the judgment; and that it ceased to be a lien upon the land from the moment such levy was made. The principles of that case are, I think, conclusive upon the present question. It is clear that the defendants, in order to support their title, must show that the judgment, under which they derive it, retained a lien upon the land at the date of their purchase, older than the lien created by the complainant's mortgage; because, at the time of the sale, they had full notice of that mortgage, and can only protect themselves against it, by showing that the prior lien of the judgment was still subsisting. It is indeed in this particular, a mere contest about the priority of liens; and not a question of whether a purchaser at execution sale is effected by any irregularity in the proceedings. This view of the case would seem to supersede the necessity of noticing the other ground of defence; because, if the defendants acquired no title under their purchase, they have no right as mere strangers, without interest in the matter, to question the validity of the complainant's mortgage, upon the score of ambiguity, or uncertainty in the description of the mortgage property. If, however, they were at liberty to raise that question, I am satisfied, although the property is somewhat generally and indefinitely described, that the vagueness in this particular, is not so great as to render the mortgage absolutely void for uncertainty. It would, therefore, resolve itself into a mere question, whether the description is sufficient to convey notice to a subsequent purchaser of the identity of the property intended to be conveyed; because, whether the judgment, through which the defendants derive title, takes precedence in date to the mortgage or not, yet, if the judgment was in *force*, and the mortgage gives no cognizable description of the property, the defendants would be entitled to protection against it, as *bona fide* purchasers without notice. Is the description sufficiently certain to warn future purchasers as to the identity and locality of the land intended to be conveyed? The land is described as "lying and being in the county of Yazoo, and State of Mississippi, situate

Bingaman v. Hyatt, et al.

on Short Creek, about three miles from Manchester, in township eleven, range two, west; in sections eight, nine, ten, and fifteen, containing about two thousand acres.

I cannot doubt that this description is sufficient to point the inquirer to the precise locality of the land. The county, township, range, watercourse, and sections on and in which it is situated, are precisely and particularly described. There is no attempt to show that the mortgagor owned more land in that township, and in those sections, than the two thousand acres conveyed to the complainant. A reference to the register of deeds, or the land office, would readily have shown what parts of those sections were covered by the conveyance. The rule is, that although the description may not be certain in itself, yet if it points to anything which will give exact information of the locality and boundary of the premises, it is sufficient to charge a subsequent purchaser with notice. In the late case of *Malden and Parker v. Hughes*, I had occasion to examine this question, and the principles there laid down are applicable to this case. One of the most striking features about this case, is the fact, that, under an execution calling for but one hundred and sixty dollars, and the accruing interest, a levy and sale was made of nearly sixteen hundred acres of land, consisting of various subdivisions. This levy was excessive, as is shown by the fact, that the land brought more money than was called for by the execution. In the case of *Stover v. Boswell's heirs* (3 Dana's Rep. 235), the Supreme Court of Kentucky held, that a sheriff, who levies upon and sells more land than is necessary to satisfy the execution, exceeds his authority, and that such a sale is void; especially where the land was susceptible of division. Without giving any decided opinion upon this point, I am satisfied, upon the other grounds which I have examined, that the complainant is entitled to enforce his mortgage against the land, in opposition to the claim of the defendants.

I shall, accordingly, direct the case to be referred, to ascertain the amount due on the mortgage; and, on the coming in of the report, a decree of foreclosure may be had.

DECEMBER TERM, 1843.

WILLIAM B. MEARS AND JOHN WALKER v. EDWARD L.
WINSLOW, et al.

The lien of an attachment commences and takes effect from the time of the *levy*, and not from the time of *issuing* the attachment.

THE bill charges, that on the 5th of April, 1841, the complainants, Mears and Walker, obtained a judgment against Edward L. Winslow, in the Superior Court of law in the county of Cumberland, in the State of North Carolina, for \$7486.26, with interest at the rate of six per centum per annum till paid ; that the execution which issued thereon was returned by the sheriff of said county indorsed, "no property," &c. ; that said Winslow is a citizen and resident of the State of North Carolina, and is insolvent ; yet that he purchased of William W. Jones, and paid for, two tracts of land, lying in this State, one in the county of Yazoo, and the other in the county of Tallahatchie, and had procured the same to be conveyed to John W. Ochiltree, who now holds the same in trust for said Winslow, Ochiltree not even pretending to hold any beneficial interest therein ; that as Winslow resides without the limits of this State, a judgment cannot be obtained against him, and prays that Winslow and Ochiltree be made defendants, that said lands be sold and the proceeds applied to the payment of complainants' debt, and that Ochiltree be compelled to convey the same to the purchaser at the commissioner's sale ; and prays for an attachment against the lands.

The bill was filed and the attachment issued on the 11th day of October, 1841. The attachment was levied on the land in Yazoo, on the 13th of October, 1841, and on the land in Tallahatchie, on the 9th of November, 1841. At the June term, 1842, John B. Wright and Charles P. Mallet, who are citizens of North Carolina, were made defendants, on their petition, and filed their answer, admitting the indebtedness of Winslow to the complainants, as charged

Mears & Walker v. Winslow, et al.

in their bill, but denying that either Winslow or Ochiltree has any interest, either legal or equitable, in said lands, and averred that they belonged to respondents ; that Wm. W. Jones had conveyed them to Ochiltree, for the use and benefit of Winslow, who paid for them as charged in the bill ; that Winslow resided in North Carolina, and had them conveyed to Ochiltree, who promised to repair to this State, and superintend them, for the greater facility in selling them, making titles, &c. ; that in May, 1840, Winslow, together with one Warren Winslow, his partner, being much indebted in North Carolina, conveyed all their property, including said lands, to respondents, in trust for the use and benefit of their (Winslows) creditors, which deed of trust was filed for record, and duly recorded in this State, on the 13th day of October, 1841 ; that, in pursuance of the intention and wish of the parties, Ochiltree, in September, 1841, conveyed the same lands to respondents, which deed was also filed for record on the 13th of October, 1841, thus giving respondents both the legal and equitable interest in said lands ; and that all the property, real and personal, conveyed by the said Edward L. and Warren Winslow to respondents in trust as aforesaid, will fall far short of discharging the debts therein provided for.

George S. Verger, for complainants.

The bill in this case was filed under the act of 1821 (How. and Hutch. 520), and is commonly called a chancery attachment. Its object was to have sold the interest of Winslow in certain land mentioned and described in the bill.

The land was held by Ochiltree, as the bill avers, and the answers admit, for Winslow, who paid for it, but the deed was made to Ochiltree, to enable him to sell it for Winslow.

The bill was filed on the 11th of October, 1841.

The defendants, Walker and Mallett, claim it under a deed of trust from Winslow, made in May, 1840, recorded the 13th of October, 1841, and by deed in fee from Ochiltree, dated in September, 1841, and recorded at the same time of the deed of trust. The former is an assignment in trust for the benefit of creditors, and the latter is an absolute deed from Ochiltree to the trustees, or assignees, without expressing the trust.

Mears & Walker v. Winslow, et al.

1. There is no question that Winslow's interest was subject, even at law, to execution. The entire interest and use was in him, and a bare legal estate in Ochiltree. How. and Hutch. p. 349, sec. 29.

2. There is likewise no question, that the lien of the attachment takes effect, in cases like this, from the filing of the bill, and not from the time the attachment is actually levied. Examine *Kenney v. Brent*, 6 Cranch, 144 ; 3 Randolph, 94 ; 3 Leigh, 299 ; 5 Munsford, 178 ; 3 J. J. Marshall, 444 ; 5 Littell, 52 ; 3 Monroe, 406.

3. When lands are held by A for B, the transfer of the title is void as to the creditors of B, if not recorded. Mere equitable interests, perhaps, not subject to execution at law, may not be required to be recorded ; but an interest which by law is subject to a judgment, is certainly embraced in the act of Assembly. How. and Hutch. 343.

E. Mason, for Wright and Mallet.

Under the facts in this case, it is useless to say a word ; as equity follows the law, and acts by analogy to the rules of common law in relation to estates ; and the first maxims of equity, as laid down, apply to this case : " That where there is equal equity the law must prevail ; and a defendant has an equal right to the protection of a court of equity to protect his title, as the plaintiff has to assert one."

By our statute, deeds take effect from the date, if recorded within three months, except deeds of trust and mortgages. The one in question, from Ochiltree to Wright and Mallet, is a deed in fee, executed in September, 1841, and recorded in October, 1841; within a month.

Respondents pray that your Honor may make such a decree as will secure their title in the premises, that they may go on to apply the assets to pay the debts of Winslow.

CHANCELLOR. This bill is filed by the complainants, as creditors of E. L. Winslow, of the State of North Carolina, seeking to subject certain lands in this State, to the payment of their claim, under our chancery attachment law. It is alleged that, although the title to the land stands in the name of the defendant, Ochiltree, that, in point of fact, he holds the mere naked legal title, and that

Mears & Walker v. Winslow, et al.

the whole beneficial interest therein is in the defendant, Winslow. After the filing of the bill, Wright and Mallet were ordered to be made parties defendant upon their petition, showing an interest in the subject-matter of the suit. They accordingly answered and set up claim to the land by virtue of an assignment to them, by Winslow, in trust for the payment of debts, dated in May, 1840, and filed for record in this State on the 13th of October, 1841. That to enable them to carry out the trust, Ochiltree conveyed to them the legal title (which he held merely for the use of Winslow) by deed, bearing date in September, 1841, and recorded at the same time with the deed of assignment from Winslow. The complainants' bill was filed, and attachment issued on the 11th of October, 1841, and levied on the land the 9th day of the following month. The only question which arises under this state of facts is, which binds the land, the attachment, or the deed of trust. The assignment by Winslow, and the conveyance from Ochiltree, are to be regarded as parts of the same transaction, and, taken together, amount to nothing more than a conveyance from Winslow in trust, for the payment of his debts. Deeds of trust, under our statute, take effect as against creditors only from the time they are recorded. This deed appears to have been recorded after the issuing but before the levying of the attachment. The simple inquiry then is, at what time does the lien arising under an attachment commence? Is it from the date of the attachment, or the date of the levy? The counsel for the complainant insists, that it takes effect from the time of filing the bill, or issuing the attachment. I have not been able to satisfy my mind of the truth of this proposition. A bill of this description bears no analogy whatever to a judgment creditor's bill, who, having exhausted his legal remedies, comes here to enforce the lien which his judgment gives him, in equity, upon the equitable assets of his debtor. In such case a priority is acquired, by filing the bill. I take it to be clear, that an attaching creditor in this, as in all other kinds of attachments, acquires no right, nor interest in, nor lien upon the land of the debtor, by simply issuing out an attachment. I do not find that the law gives to this description of attachment any higher dignity, or greater efficacy, than to the ordinary attachment at law. Suppose

the defendants, instead of claiming under the assignment in trust, had become the judgment creditors of Winslow, between the issuing and levying the attachment, the argument of the complainants' counsel would make the attachment overreach the lien of the judgment. And yet, in such a case, I am persuaded the priority of the judgment would be readily admitted. I think it will also be admitted, that the specific lien, created by the deed of trust, is quite as effective and comprehensive in its reach, as the general lien created by a judgment. I conclude, that the lien of an attachment commences and takes effect from the time of the levy, and not from the issuing of the attachment. This was the construction placed by the Supreme Court of Virginia upon the statute of that State, on the subject of chancery attachments, of which ours is almost a literal copy. *Williamson, et al. v. Bowie, et al.*, 6 Munf. Rep. 176. In that case, the Court said the attachment operates from the time of the service of the proofs. The same rule was laid down by the Supreme Court of South Carolina, in the case of *Stephen v. Thayer*, 2 Bay's Rep. 272. The opposite construction would be fraught with the greatest difficulty and injustice. It would even defeat a *bonâ fide* purchaser, who became such, *mesne* the issuing and levy of the attachment. Even if it were a proceeding in which the complainant set up title to the property, yet the notice arising from the *lis pendens*, would not commence until the actual service of the leading process, and of course could not affect a purchaser who became such prior to such service. *Murray v. Ballou*, 1 John. Ch. Rep. 576; 15 John. Rep. 315. From this view of the case I am of opinion, that the complainants' bill must be dismissed at their costs. Let a decree be prepared accordingly.

Robinson v. Thompson, et al.

DECEMBER TERM, 1843.

WILLIAM ROBINSON v. THOMAS J. THOMPSON, et al.

R., holding a mortgage on T.'s property, agreed to receive some money and take the property back, in discharge of the mortgage; T. paid the money, but refused to deliver the property; *held*, that the mortgage was not discharged by the agreement.

R., being surety to A. R. for T., was indemnified by a mortgage on T.'s property; and filed his bill to foreclose the mortgage, and be discharged from his suretyship; *held*, it was no answer to this bill, that T. had been garnisheed at law, as a debtor of A. R., and that the garnishment was still pending.

A mortgage being given to secure a debt to a partnership, upon the death of one of the firm, the surviving partner is the only necessary party, to represent the partnership interests.

The bill in this case was filed by William Robinson, against Thomas J. Thompson, and Andrew J. Rembert, to foreclose a mortgage given by Thompson under these circumstances.

Andrew J. Rembert and George Rembert sold Thompson two negroes for twelve hundred dollars, and took his note, with the complainant and William M'Grew as sureties; to indemnify and save them harmless, Thompson executed a mortgage on these negroes, by which it was provided, that if Thompson should make default in the payment of the note, for twelve hundred dollars, the sureties, or either of them, might, at any time after the maturity of the note, take the negroes, sell them, and with the proceeds of the sale pay off the note; and Thompson covenanted in case of default, to deliver them the negroes. Thompson paid three hundred dollars on the note; and suit was instituted by Andrew J. Rembert (to whom the bill averred the note had been assigned), in the Circuit Court of Copiah county, against all the parties to the note for the balance; Thompson refused to deliver the negroes to the complainant, and M'Grew refused to unite with him in the bill; and accordingly, Robinson exhibited the bill in his own name.

The prayer of the bill was for account, foreclosure, and sale.

Thompson answered, and made his answer a cross-bill; he admitted the sale and mortgage, but stated that, pending the suit at law, he had paid A. J. Rembert, who had control of the note, \$300,

Robison v. Thompson, et al.

and resold him the negroes, in full payment and discharge of the balance of the note ; that he was about having a receipt to that effect, on the back of the note, signed by Rembert, when, at the complainant's instance, it was not done, and the note was delivered up to the complainant with the unsigned receipt on its back ; and the suit at law was dismissed at Rembert's costs ; that the complainant, in his supposed character of trustee, expected to get the negroes for his own use, and therefore pursued the course he did ; that the note was wholly paid ; and he prayed that Rembert and Robinson might answer.

Their answers denied the allegations of the cross-bill, and disclosed this state of fact : that *an agreement* was entered into between Thompson and Rembert, and M'Grew and the complainant, that, for the benefit of the latter as sureties, Thompson and Rembert should settle the suit at law ; Thompson was to pay Rembert \$300, and deliver him the negroes in discharge of the note, and that Rembert should dismiss the suit, pay the costs, and deliver up the note ; that the note was delivered to Robinson ; that the \$300 were paid, and the suit dismissed, but that Thompson wholly failed and refused to deliver the negroes to Rembert ; and that, as in duty bound, Robinson had redelivered the note to Rembert, who had instituted a new suit, the one now pending at law upon it, against all the parties to it. That on the 4th day of May, 1840, and since the pretended resale, Thompson had made affidavit that the negroes *were his own property*, to prevent their being levied on and sold under execution, as the property of George W. Rembert ; and that in a trial of right of property, of which the affidavit was the foundation, the negroes were adjudged to Thompson. The answer denied all fraud.

A. J. Rembert, in his answer to the original bill, elected to make himself a party complainant thereto, and claimed the benefit of the mortgage for the payment of his debt.

M'Grew's answer claimed that he was discharged from his suretyship by the arrangement between the creditor and principal debtor, as disclosed by the bill and answers.

Thompson afterwards, by leave of the Court, filed an amended answer, denying the assignment of the note to Andrew J. Rembert, announcing the death of George M. Rembert, and claiming that his

Robinson v. Thompson, et al.

personal representatives be made a party to the bill ; averring that before any demand on him was made by A. J. Rembert to deliver him the negroes under the contract for a resale, he was garnisheed at law as a supposed debtor of Rembert's, by J. and A. Miller, which process of garnishment was still pending : that Robinson had obtained a writ of *habeas corpus* for the negroes in controversy, at the trial of which the title to the negroes had been adjudged against the complainant ; and his right, therefore, to investigate the question of title in chancery, was denied.

It was admitted by counsel,

1. That George W. Rembert was dead at the time the bill was filed.
2. That the *habeas corpus* sued out by Robinson, to get possession of the negroes, was decided against the complainant.
3. That Thompson had taken the benefit of the bankrupt law, and in his schedule of assets he had made oath in May, 1842, that the negroes in controversy were his own property.

The deposition of M'Grew proved that the complainant had informed him of the agreement between Thompson, Rembert, and himself, and had stated that the note was paid, and they were wholly discharged from all liability upon it.

The deposition of Holiday, the sheriff of Copiah county, and of John M'Grew, the clerk of the county, proved the affidavit by Thompson, that the negroes were his own property.

J. A. Maxwell, for complainant.

The suretyship of Thompson and M'Grew, the execution of the note and mortgage, are admitted by the answer of defendant ; and complainant is entitled to a decree, unless the new matter set up by Thompson shall prevail. His defence consists of the following matters and allegations :

1. That the mortgage note was fully paid off and satisfied by the payment of \$300, and a resale of the negroes by Thompson to Rembert.
2. That G. W. Rembert, one of the payees in the note, was dead when the bill was filed, and his administrator is not made party.

Robinson v. Thompson, et al.

3. That the proceedings on the writ of *habeas corpus*, before Judge Harris, are final and conclusive, and a bar to the relief sought in the bill.

4. That Thompson has been garnisheed as a debtor of Rembert, and that proceeding is still pending.

1. The payment of \$300 on the note, is admitted ; but the alleged resale and delivery of the negroes, in satisfaction of the balance of the note, is denied. There was an agreement between Thompson and Rembert to that effect ; but Thompson never would comply, by delivery of the negroes. The money was paid on the 7th February, 1840. Seventeen days after that time, and before Rembert called for the negroes, as Thompson states in his answer, to wit, on the 14th February, 1840, the sheriff levied on the negroes, as the property of Rembert. On May 4, 1840, Thompson gave to the sheriff a claimant's bond, and made affidavit that those negroes were not the property of Rembert, but were at that time his property ; and that he then claimed them under his original bill of sale from G. W. and A. J. Rembert, made in 1838. Yet Thompson in his answer, swears, that he paid off the mortgage note by a resale of those negroes to Rembert, in February, 1840. Here we have *oath v. oath* of the defendant — one neutralizing the other. To ascertain which oath is true, we must look further into the case. On May 4, 1842, and long since the commencement of this cause, Thompson filed his application in the Bankrupt Court ; and on his schedule of assets, by him sworn to, he sets down these same negroes as a part of his assets at that time ! Besides, it is proven that Thompson has had the negroes in possession ever since 1838 : he has resisted all attempts to deprive him of the possession, and he still claims the negroes as his property, and does not pretend that he repurchased them from Rembert, subsequent to the alleged resale. There can be no resale without a delivery of the negroes by Thompson to Rembert, and the agreement is shown never to have been complied with.

2. It is admitted, that G. W. Rembert, one of the payees on the note, was dead when the bill was filed ; but the payees were partners in trade under the firm of G. W. & A. J. Rembert ; and the note was indorsed by the firm before the death of J. W. Rembert.

Robinson v. Thompson, et al.

A. J. Rembert is entitled to the note on two grounds : 1. As surviving partner ; and, 2. As indorsee. The defendant's own witness proves, that in July, 1840, A. J. Rembert had control of the note, and was authorized to settle the same with Thompson : and Thompson alleges, that he paid the note in full to A. J. Rembert by a resale of the negroes ; thereby acknowledging the right of Rembert. But, admitting that the bill should be dismissed as to Rembert ; as between Robinson and Thompson, it could not affect the case. The note is not paid, and Robinson is security ; Thompson is an applicant in the Court of Bankruptcy, and a suit is pending in the Circuit Court against Robinson. The mortgage should be foreclosed, the property sold, and the money brought into Court for the indemnity of Robinson.

3. The consideration of the third point involves the proceedings on *habeas corpus* before Judge Harris. There is no record of these proceedings, but by agreement the testimony of Judge Harris is to stand in lieu of the record. This was a writ sued out by Robinson against Thompson, to obtain the possession of the negroes ; the decision was in Thompson's favor ; and M'Grew's sayings and doings were admitted in evidence, he being one of the mortgagees. These proceedings cannot affect the rights of Rembert, for he was not party to the record ; and the whole matter was *coram non judice*. By reference to the *habeas corpus* act, H. & H. 665, and to the proofs in this case, it will appear that there was no such case made before the Judge, as that he could give any judgment in favor of Robinson. The slaves were never taken nor seduced out of the possession of Robinson, by force, fraud, or otherwise ; he never had possession of them ; he never was the owner nor overseer of the slaves. The title to property cannot be tried on *habeas corpus* ; nothing but the naked question of possession.

4. The fourth ground of defence, is, that Thompson has been served with summons of garnishment by Rembert's creditors : he does not allege that a judgment has been rendered, or that he has paid anything as garnishee. If he had, however, it could not affect this case. By virtue of the mortgage, Robinson is entitled to have the mortgaged property subjected to the payment of the debt upon which he is bound as surety. If the property should be sold, the

Robinson v. Thompson, et al.

fund would be under the control of the Court : it could be applied to the extinguishment of the mortgage note, and thus indemnify the security. These facts would discharge Thompson of all liability as garnishee ; and the creditors of Rembert, upon a proper application to this Court, could subject the fund, to the payment of their debts.

Work, for Thompson and M'Grew.

The Court will perceive that in this case the defendant, Thompson, assumes three grounds as a defence to the bill.

1st. Thompaon resold the negroes, for which the note was given, which extinguished the mortgage. This is a matter of fact, to be determined by the papers before the Court. The answer of Thompson and M'Grew states it, and it is proved by the deposition of M'Grew, who states, that Robinson took the note to him, and told him, in substance, that it was paid; and he says, the agreement of resale was between Rembert and Thompson, and that Robinson was no party, and not cognizant of the resale, and therefore the feeble denial of Robinson can have but little weight with the Court on this point.

2. The complainant obtained a *habeas corpus* to try the right of property to the negroes he wishes to subject to sale in this case, which was decided for Thompson ; and the complainant, having elected to try the question at law, is bound by that decision, and is not entitled to any relief in this Court.

3. The defendant Thompson is garnisheed as the debtor of Rembert in two cases of large amount, not yet decided; and, till the disposition of those cases, the negroes ought not to be taken from him.

One of the Remberts is dead, as is admitted by the counsel, and appears from the proof, and the notes were given to both of them, and it nowhere appears that the dead one has assigned his interest to the other, and the personal representatives of the deceased one are not before the Court, for which cause the bill should be dismissed.

The principles involved in this case are so familiar to the Chancellor, that it is supposed unnecessary to cite authorities, and the

Robinson v. Thompson, et al.

counsel cheerfully refers the questions to the superior abilities and attainments of the Chancellor.

CHANCELLOR. This is a bill in the ordinary form to foreclose a mortgage, given by the defendant Thompson upon two negro slaves, to the complainant and the defendant M'Grew, to indemnify them as Thompson's sureties, on a note payable to A. J. & G. W. Rembert, for the sum of twelve hundred dollars. The mortgage provides, that if Thompson failed to pay said sum of money, the mortgagees should be at liberty to sell the slaves, and apply the proceeds in discharge of their liability, as sureties of the mortgagor. It is further alleged, that Thompson failed to pay the note, except the sum of three hundred dollars; and that he refused to deliver the slaves to be sold in accordance with the terms of the mortgage.

It appears that the note upon which the complainant is surety, was given to the Remberts for the purchase of the same slaves, afterwards mortgaged to the complainant and M'Grew. The defendant (Thompson) resists a foreclosure of the mortgage, upon three grounds. 1. He insists, in his answer, that the note, against which the mortgage was given as indemnity to the complainant, has been extinguished by an agreement between himself and Rembert, that he should pay three hundred dollars, and deliver back the slaves to Rembert, in discharge of the remainder of the money due on said note. Although such an agreement may have been made, yet the proof falls short of showing a compliance therewith, on the part of Thompson. On the contrary, he is shown not only to have retained the possession of the slaves long after this agreement, but made oath that they were his property. Even, therefore, if such an agreement was made, it is clear that it was never carried into effect, and that the right of property in the slaves was not thereby changed. It would be a novel application of the rule of equity, to consider that as done which was agreed to be done, in favor of a party, who himself prevented the execution of the agreement.

2. The second ground taken, is, that the defendant Thompson has been garnisheed at law by the creditors of Rembert. I do not readily perceive what connection this fact has with the right of the

Robinson v. Thompson, et al.

complainant to foreclose his mortgage, and have himself discharged from his suretyship, by applying the proceeds of the slaves in payment of the debt for which he is bound, to any one who may show a legal right thereto. A payment of the debt to Rembert's creditor, if legally entitled thereto, would as fully discharge him, as if paid to Rembert himself. Such a state of things would only devolve upon the Court a different application of the money from that which would otherwise take place.

3. The third ground is, that no decree can take place in favor of the complainant, until the representatives of G. W. Rembert, who is alleged to be dead, are made parties. The proofs disclose the fact, that A. J. & G. W. Rembert were partners, and, according to a familiar principle of the law of partnership, the right of administering the partnership effects survived to the surviving partner ; he, therefore, is the proper and only necessary party to represent the partnership interests. From this view of the case, I am of opinion, that the complainant is entitled to the relief which he asks, and shall accordingly direct a reference, to ascertain the amount now due from Thompson, and, upon a report being made, a decree of foreclosure and sale may be had on the usual terms. The decree must provide that the money when collected shall be brought into Court, subject to be applied as the Court may direct.

DECEMBER TERM, 1843.

BENJAMIN E. PHILLIPS v. GEORGE SAUNDERSON, et al.

Where, by a contract of sale of real estate, part of the purchase-money was to be paid down, and the remainder in instalments, secured by deed of trust, before the property is to be delivered, and only a portion of the cash payment is made, and the property is delivered, and the deed of trust for the instalments taken ; *held*, that the vendor has no equitable lien upon the land sold, for the unpaid portion of the purchase-money, agreed to be paid in cash.

Where there is an express lien, reserved by the vendor for part of the consideration-money, of real estate sold, it excludes the idea of an implied lien on the land for the residue of the unpaid purchase-money.

Where a party buying land, agreed to make a cash payment in part, and secure the remainder of the purchase-money by deed of trust on the land purchased, and when the sale was consummated, paid only a portion of the proposed cash payment, and the vendor filed a bill in equity to enforce a supposed equitable lien for that unpaid portion ; *held*, although the complainant was not entitled to the relief he asked, yet his bill shall be dismissed at the cost of the vendee, who occasioned the injury.

THE facts of this case, so far as they are material to the decision of the Court, will be found at length in the opinion of the Chancellor.

Hutchinson and Foote, for the complainant, contended :

That the vendor has a lien on the land sold, for the portion of the purchase-money remaining unpaid. *Fonb. Eq. 295*. See also *Walker v. Preswicke*, 2 Ves. 622 ; *Pollixsen v. Moore*, 3 Atkins, 272, as to the lien against the purchaser, or any one claiming under him with notice.

The taking of a promissory note for the purchase-money does not affect a vendor's lien. *Garson v. Green*, 1 John. Ch. R. 309 ; *Kenney v. Collins*, 4 Littell, 389 ; *Johnson v. Gwathney*, do. 317.

To constitute the waiver of a lien, the security must be distinct and independent ; the bond of the vendee alone would not be sufficient. *Cox v. Fenwick*, 3 Bibb, 183 ; 1 Mason, 192 ; 4 Littell, 289 ; do. 317. See 1 Paige's Ch. R. 21, and 1 Maddock, 356 ; 1 Vernon, 267, note 3 ; 6 Ves. 752, note 2.

Phillips v. Saunderson, et al.

Hughes, for defendant, Lane.

The bill is filed to set aside an executed agreement for the sale of land and negroes ; or, in the event that this cannot be done, then, that the estate sold may be subjected to a lien for about \$8000, a part of the purchase-money, which had not been paid.

The bill alleges, in substance, that Phillips sold a plantation, negroes, and cotton and corn crops, to Saunderson, for about \$68,000, \$18,000 in cash in hand, about \$20,000 to Reynolds, Marshall, & Co., which was necessary to be paid, to raise a lien which was subsisting on the estate sold, and the balance in one and two years ; that to secure the payment of the second, third, and fourth payments, a deed of trust was given on the property sold ; by the fraud of Saunderson, Phillips was induced to deliver the deed for the land and negroes, before the whole of the cash payment was made, and there is yet about \$8000 due ; alleges that Lane had notice of the fraud. Lane bought subject to the lien attempted to be set up. The bill alleges, also, that after Lane purchased, the complainant was induced, by the fraud of the defendant, to release the deed of trust.

All the material allegations of the bill, so far as they affect the defendant Lane, are denied by answer.

The proof makes no case against Lane.

The whole matter amounts to this only, that complainant improvidently and incautiously so made his arrangements with Saunderson, that Saunderson has got the advantage of him ; with this the defendant Lane has nothing to do.

It is insisted on the part of the defendant Lane :

1. That the bill should be dismissed ; no case can be made out against Lane, showing that a rescission of the agreement should take place.

2. No case is made by the bill, answer, and proof, upon which the Court will declare a lien in favor of the complainant, as to that portion of the purchase-money which was to be paid in cash in hand, but was not so paid before the deeds were delivered ; as to Saunderson, even, this could not be done ; because the rule is well established, that where security by bond, with surety or mortgage, has been taken for the purchase-money, in part or in whole, the equitable lien is waived or discharged. See *Fisk v. Howland*, 1 Paige's Ch. R. 20.

Phillips v. Saunderson, et al.

CHANCELLOR. The only facts which I deem it material to notice are these. In October, 1835, the complainant, Benjamin E. Phillips, sold and conveyed to George Saunderson, a plantation and slaves in the county of Hinds. Eighteen thousand dollars of the purchase-money was to be paid when the property was delivered, the remainder of the consideration was to be paid in instalments, at different periods thereafter, and was then secured by a deed of trust on the property from Saunderson. Shortly after this, a payment of some nine thousand dollars was made by Saunderson, and thereupon possession of the property, and of the deed of conveyance, were duly delivered to him; without any security being retained for the remainder of the eighteen thousand dollars, which, by the terms of the contract, was to have been paid when such possession was delivered. This omission is alleged to have been the result of a misapprehension on the part of the complainant, he having been led to the belief, that the deed of trust covered the \$18,000, which was to have been promptly paid in the manner stated, as well as the instalments to be paid thereafter. Shortly after this, Saunderson sold and conveyed the same property to the defendant Lane, who agreed, amongst other things, to pay off and discharge the money due to Phillips on the deed of trust from Saunderson. It appears that a portion of the cash payment which was to have been made to Phillips, and for which he had no security, was still unpaid at the time when Lane purchased from Saunderson, and that Lane knew that fact. Upon this state of facts, the bill prays, that the sale to Saunderson may be rescinded, or that the balance due from him, on the first payment, may be declared to be a lien on the land in the hands of Lane, and enforced by a decree of this Court. The bill charges fraud on Saunderson in procuring the possession of the deed and of the property, without paying the money which was then to have been paid. There is no proof establishing fraud in the act referred to; and if there were, there is nothing whatever to show that Lane participated in it, or had any knowledge of such fraud, at the time of his purchase from Saunderson. Lane would, therefore, in this particular, stand as a *bonâ fide* purchaser without notice of the alleged fraud, and there could consequently be no pretext for rescinding the contract.

Phillips v. Saunderson, et al.

as against him. The principal question is, had Phillips an equitable lien on the land, for the money here claimed, at the time when Lane purchased from Saunderson ; because the simple notice to Lane, that the money was unpaid, cannot render the land liable in his hands, unless the money constituted an equitable lien on the land, as against Saunderson. That no such lien existed is evident, for two reasons : 1. The very nature and terms of the contract show that such a lien was not within the contemplation of the parties thereto ; because the sum of money for which it is claimed, was to have been promptly paid upon the delivery of the property ; and although its payment was waived at that moment, it was still looked to as a prompt payment. The equitable lien of a vendor can only arise where the sale is made upon a credit ; here no such credit was given or contemplated as to that portion of the consideration-money for which a lien is now claimed. Such a lien arises by implication of law, and may be waived by any act of the parties, showing that it was not intended to be retained. I think that the acts of the parties, in this case, fully exclude the idea of an implied lien. 2. The second reason is, that the complainant retained an express lien upon the property as to much the larger portion of the purchase-money, thus excluding the idea that it was intended to be retained as to any amount beyond that specified in the contract. I understand the rule is settled, that, where there is an express lien on the estate, for a part of the consideration-money, it excludes the idea of an implied lien for the residue. *Bond v. Kent*, 2 Vern. Rep. 281 ; *Fish v. Howland*, 1 Paige, Rep. 31 ; *Little v. Brown*, 2 Leigh, Rep. 353. The same rule is recognized in the case of *Brown v. Gilman* (4 Wheat. 291), where Mr. Chief Justice Marshall says : "The express contract, that the lien shall be retained to a specified extent, is equivalent to a waiver of that lien to any greater extent."

According to this view of the case, I shall direct the bill to be dismissed, at the costs of the defendant Saunderson, who occasioned the loss and injury to the complainant by his default. Let a decree be prepared accordingly.

DECEMBER TERM, 1843.

REDDING B. HERRING v. ANTHONY V. WINANS, et al.

Courts of equity have power to grant new trials at law, where, from fraud of the one party, or unavoidable accident, or unforeseen necessity, the other party, without negligence on his part, has been unable to make out his case, on the first trial.

H., being an old and infirm man, unable to read, and being sued out of the county of his residence, sends to his lawyer, residing in the county where the suit is brought, the nature of his defence, and instructs him to defend the case; the letter is lost in the transmission, and judgment is obtained against H. by default; *held*, upon the application of H. for a new trial in a court of equity, that his excuse for not making his defence at law was sufficient.

Where a note, made for discount at a bank, is made payable to the banking company, and is signed by G. as principal, and H. and others, as sureties, and the bank refuses to discount it, and the note is afterwards passed to W., in payment of the debt of some third person, neither principal nor surety to the note, and without their assent, W. having full knowledge of the object of the creation of the note; *held*, that the note in the hands of W. was not obligatory upon the surety.

Where a note is payable to a banking company, and is taken by W., without indorsement from the payees, W. is affected by all the equities of the makers of the note.

Where a party designs to protect himself under the defence of being a *bona fide* purchaser, for a valuable consideration, without notice, it is a defence which he must set up himself; and it is not necessary for the other party to charge him with notice.

THE bill in this case states that the complainant, Redding B. Herring, made a note with the defendants, Thos. M. Green and Robert M'Kay, as sureties for one Henry Green, deceased, payable to the Mississippi Union Bank, for the purpose, and no other, of being discounted at that bank; that it was not discounted, the bank refusing to do so; that the defendant, Anthony V. Winans, obtained possession of the note, with full knowledge of the design of its execution and its failure, and charges on the 7th page of the bill, "that your orator is informed and believes, and so charges, that said A. V. Winans received said note in payment of a debt due to him from some persons other than the said Henry Green; that said bank has no interest in the suit," &c. The bill further states, that the complainant, knowing said note to be "*functus officio*," had never heard of it, till he was sued upon it at law, in the name of the Mississippi Union Bank, use of A. V. Winans; that on the 27th day of February, 1841, process in that suit was served upon

him ; that of this service he knew nothing ; his only knowledge of the suit was derived from a letter to him from Judge John J. Guion, his retained attorney to attend to his business, generally, informing him of the pendency of the suit, and asking him if he wished it defended, and if so, what was his defence ; that he is an old man, not able to read, and lives in Washington county, the suit being brought in Warren ; that he instructed his son to write to Judge Guion his defence, which his son did ; that the letter was sent in time to have reached its destination before Court, but it miscarried on the way, and judgment by default was obtained in May, 1841, against him ; that, under the inparlance law, supposing the case defended, he knew no trial could be had till fall ; that in the fall a dreadful epidemic prevented a Court, and that his first knowledge of the judgment being obtained against him was in February, 1842, when the execution was levied on his property ; that the judgment at law was taken without the production of the original note, which is outstanding somewhere, he does not know where, and he calls upon the defendant, Winans, to produce it. The bill also expressly charges, that the note was fraudulently obtained from the Union Bank, and, without the knowledge or ratification of complainant, transferred to defendant, Winans, in payment of the debt of some third person to said Winans, who well knew the note was void; the bill prays for a new trial at law, or a cancelment of the note and perpetual injunction. An amended bill, of a few lines, stating that an *alias* execution had been sent to Washington county, as well as the execution to Warren, was written on the original bill, after the first *fiat* had been granted, and before the original bill had been filed in the clerk's office ; the Circuit Judge also enjoined this execution to Washington by a separate *fiat*. This amended bill was not sworn to ; it contained no allegation except the fact of the issuance of the *alias* execution, and the prayer for its injunction.

To this bill and amendment there is a demurrer, for four grounds:

1. That a bill for a new trial at law does not lie in a court of equity.
2. That the excuse shown by the complainant, for not making his defence at law, is not sufficient to justify the interposition of the Chancellor.

Herring v. Winans, et al.

3. That the bill does not disclose a defence that would, if made at law, have defeated the action on the note.
4. That the amended bill is not verified by oath.

J. F. Foute, for defendant, Winans.

The counsel for the defendant, Winans, believe that the causes of demurrer are sustained by the following cases and authorities, viz: — 1 John. Ch. Rep. 320, *Smith v. Mead & Lowry*; ib. 465, *Baker v. Elking & Simpson*; ib. 49, *Lansing v. J. & T. Eddy*; and the cases cited by the Chancellor: — 1 Schoales and Lefroy, 201, 7 Cranch, 332, *Bateman v. Wilcox*, and *Marine Ins. Co. of Alexandria v. Hodgson*; 2 Story's Eq. 181, § 896, p. 183, § 897; 6 John. Ch. R. 90, ib. 479, *Foster v. Wood*; 2 ib. 13, ib. 13, *Chisholm and Anthony, Adms. of James v. Reps. of Thomas*; 2 Munsford, 253, *Fenwick v. Murdo*; 2 Bibb, 241, *Gales v. Shipp*; ib. 326, *Vetch v. Pennybacker*; 3 ib. 486, *Lawless v. Reese*; 4 ib. 349, *Band v. Belsh*; 1 Littell, 140, *Harrison v. Harrison*; 2 Wash. R. 255, *Pickett v. Morris*; 1 Call, 224, *Manier v. Whiting*.

If the defendants may be allowed to insist upon any matter, not specially assigned as cause of demurrer in this case, they call the attention of the Court to this fact, that the amended bill, filed, and upon which the injunction was ordered to be issued, was never sworn to by complainant, or any one else.

The original bill was sworn to, and *sicut* made thereon, on the 7th of March, 1842, for an injunction to the sheriff of Warren county; the amended bill, on which the injunction was ordered to the sheriff of Washington county, was filed without any leave obtained for that purpose, and *fact* thereon granted on the 31st of March, 1842. This amendment, as the Court will see by inspection, is not verified, and was not sworn to, and the defendants insist, cannot, therefore, be sustained; and this defect is fatal on demurrer. 1 Maddock's Ch. 127, 175.

W. C. Smedes, for complainant.

1. I will notice the objection, that a bill for a new trial at law does not lie in this Court, first, as it is the foundation of the others.

Herring v. Winans, et al. —

The objection would not have been made, had the objector given the subject any examination. The truth is, before the granting of new trials became the settled practice of the courts of law, equity had original and almost sole jurisdiction to direct such new trials, on account of fraud or surprise, under the penalties of perpetual injunction. 1 Burr, 390; *Floyd v. Jayne*, 6 John. Ch. R. 479.

And in modern days, since courts of law do, where the justice of the case requires it, and it is in their power to do so, grant new trials, courts of equity interfere for that purpose more rarely, and never where the motion could have been, or was made at law, and overruled. *Dodge v. Strong*, 2 John. Ch. R. 228; *Meredith v. Johns, et al.*, 1 Henning and Munsford, 583.

Any fact, which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, without any fault on his part, will justify application to a court of chancery. *Marine Insurance Company v. Hodgson*, 7 Cranch, 332; *Foster v. Wood*, 6 John. Ch. R. 87.

But if there was any doubt at all about the Chancellor's power to interfere and grant new trials, the Supreme Court of this State have settled that question beyond cavil. *Joslin v. Coffin*, 5 Howard, 539.

2. Does the bill disclose a good defence to the action at law, if it had been there made?

I do not intend to assert, that a note signed by a principal and surety, to be discounted by one person for the benefit of the principal, and where that person refuses, afterwards discounted by any other, would be void. However, upon reason and principle, we might think the law should be, if the cases in 17 John. R. 126, 20 ib. 650, 15 ib. 205, 4 Cowen, 557, and 10 Wend. 314, did not settle it otherwise; the case of *The Commercial Bank of Natchez and &c. v. Claiborne, et al.*, 5 How. 303, would be conclusive.

But the distinction in those cases and the one under consideration is palpable. Here, there is fraud; there, there was none. There the note was discounted by the holder, in the regular course of business, fairly, for good and full consideration, received by the princi-

Herring v. Winans, et al.

pal ; here, the holder receives it fraudulently, in the payment of the debt of some one, other than the principal or surety, and without the surety's knowledge. Here, the note is not produced, when the judgment is taken or since, but sedulously concealed ; there, the note was produced and proof made *aliundè*, that the holder acquired it honestly. There, the note accomplished the object of its execution ; here, it was used for a different purpose, as an instrument of fraud. The distinction between the two cases is obvious, and the complainant, if he could have established his defence at law, would have obtained, and been entitled to, a verdict in his favor.

3. Does the complainant show a sufficient excuse for not making his defence at law ?

I think he does. He is an old and ignorant man, unable to write, resident in a different county from that wherein the judgment was had; as is known judicially to the Court, one of the largest counties in the State, with but a single postoffice in it. Old age and ignorance are never excuses for the non-performance of duty, but they are in a question of laches entitled to their weight. Upon the reception of the letter, informing him of the pendency of the suit, he instructs his son to write to counsel to defend the suit. The letter is written, but miscarries. By law, the judgment could not be taken till the second term, if the suit be plead to. Supposing it defended, he made no effort in the case at law, till the term of the Court, the return term of the writ, when the judgment was taken, had passed. It was then too late to act there ; and as soon as informed that a judgment is taken against him, he files his bill to enjoin the judgment. His omission to defend was accident, without fault, and he is entitled to relief in equity. *Marine Ins. Co. v. Hodgeson*, 7 Cranch, 332 ; *Foster v. Wood*, 6 John. Ch. R. 87.

4. Even though the complainant would not be entitled to a new trial, on the facts stated in the bill, he will be entitled to relief from the fraud of the defendant, Winans, by a perpetual injunction. Fraud is especially for the cognizance of equity, and will be relieved against at law, where the party complaining has not been able, from no fault of his own, to make his defence there. The jurisdiction of this Court, although denied by the demurrer, over matters of fraud, is too well established, and its right to check and

Herring v. Winans, et al.

restrain judgments at law, based in fraud, when no negligence can be imputed to the applicant for relief, is too well settled to need reference to adjudicated cases.

5. The failure on the part of defendant, Winans, to file the note in the suit at law, entitles the complainant to relief. This Court will not permit the defendant to hold both the judgment and the note against him. Upon a bill to foreclose a mortgage, the note must be produced before decree. *Bean, et al. v. Hawley, et al.*, 3 Conn. Rep. 110; 2 Lou. T. Rep. 12. With the same propriety should the Court require a production of the note sued on, before judgment on it will be permitted to stand.

6. The objection to the amended bill is not a material one; it sets up no new fact, as the ground for the equitable interposition of the Chancellor. The facts upon which the injunction was prayed, are all stated in the original bill. Had Court been in session, there would have been no necessity for an amended bill; a mere motion would have sufficed. If the Court would (as it had already done) grant the writ to Warren, it would, as a matter of course and of right, have granted a similar writ to Washington county.

J. F. Foute, in reply.

The defendant insists that the complainant's bill does not show that he was prevented from his defence, by fraud or accident, and without any fault of his own. The complainant was guilty of gross negligence. His bill states, that the writ was served on him on 27 Feb. 1841, by the sheriff of Warren county, at the very place where Judge Guion, the complainant's retained attorney, resides; and also, that his retained attorney, Judge Guion, early in the spring of 1841, advised the complainant, by letter, of the pendency of the suit, &c., two several and distinct notices of the suit within a short time, to prepare and put in his defence, and affording him ample time before the return term (3d Monday of April, 1841) for that purpose, if in fact he had any such defence as is stated in the bill. The complainant shows that he lived in the county of Washington, adjoining the county of Warren, in which the suit was brought, and if the Court can know anything judicially of the number of postoffices, and distances, and means of com-

munication, &c., it must know that the complainant was convenient to the courthouse of Warren county, and, whether or not, had ample time and notice for defence by himself, by service of process, and also by his retained counsel in Warren county.

The defence insisted on by the complainant, and the fraud he charges in the use made of the note sued upon, were good and available at law, for anything apparent in the bill; and indeed the complainant so considers it, and the complainant could have availed himself of the defence at law, and had full and fair notice, time and opportunity, to do so, and was bound to do so, unless prevented by the fraud of the plaintiff at law, or pure accident unmixed with negligence of the complainant, neither of which is shown by his bill, and therefore he cannot be relieved in this Court. The 2d and 3d grounds of the argument, we think fully answered and disposed of by the foregoing remarks; and we feel very confident that if the 2d ground of argument be admitted, still the complainant cannot in this case be relieved; and that the facts assumed in the 3d position are not sustained or made out by the bill; and the authorities cited in support of that position, do not, upon a careful examination of them, aid the complainant's case; and especially the cases 7 Cranch, 332, and 5 How. 303, and 539, are certainly clearly and strongly against the case made by the bill.

To the 4th position assumed by the complainant, it is sufficient to reply, that the fraud charged by the bill against Winans, if true, constituted a good and available defence at law, where the complainant was bound to make it; and having failed to do so by his own gross negligence, as his bill fully shows, he cannot now be heard to claim advantage from his own neglect.

The 5th position assumed, "that the failure of the defendant Winans to file the note in the suit at law," entitles complainant to relief here, is indeed a strange one. Winans was not bound to make proof of his note, or even file it in his action of assumpsit. The note was only evidence of his demand, and he was only bound to exhibit it to the Court when judgment was taken as evidence of his claim; this he did; the record does not show the contrary, and this Court will presume that the court of law did not grant a judgment without a proper showing by the plaintiff at law, and that

Herring v. Winans, et al.

everything was shown by the plaintiff to entitle him to his judgment. The note is now utterly worthless, and of no validity against the complainant; it is forever merged in the judgment; the record of this judgment at law will forever protect the complainant against another recovery on the same note; and the complainant does not charge any misdescription of the note sued on, or any reason or means by which he could ever be made liable to another recovery thereon. Hence we maintain that this position is not supported by reason or authority.

We beg leave to refer your Honor to the case of *Porter v. Wheat*, lately decided in the Chancery Court at Monticello, which we conceive to be in point, and fully to sustain the demurrer in this case.

CHANCELLOR. The demurrer in this case presents three questions for my consideration. 1. Does a bill lie in this Court for a new trial? 2. Is the excuse offered by the complainant in this case a valid one, for not making his defence at law; and, 3, would that defence, if made, avail him?

I have presented the points made by the demurrer in the above order, for the reason, that unless I answer them each in the affirmative, as I have stated them, the demurrer must be sustained.

Upon the first point I can have no doubt. Originally, the power to grant new trials at law, in cases of fraud or surprise, was a prolific source of equitable jurisdiction; and was so frequently called into exercise, that, from necessity, courts of common law were compelled to assume the same authority. And since, in cases where it is in their power to do so, these latter courts have exercised the right, courts of equity have rarely interfered, and never where, in the court of common law, the party had his full opportunity to obtain a new trial, and failed to avail himself of it. In that numerous class of cases, however, where it is out of the power of the common law tribunal to grant this relief, where from fraud of the one party, or unavoidable accident, or unforeseen necessity of any kind, the other party has not been able to make that defence or proof at law, which he really can make, and has himself been in no fault, and the term of

Herring v. Winans, et al.

the court has elapsed, at which the judgment at law has been rendered against him, I could not doubt, even if the question were now presented for the first time for judicial determination, that upon well settled principles of equitable jurisdiction, this Court would interfere and arrest the enforcement of an iniquitous judgment, by a perpetual injunction, until the party obtaining it should himself yield to the just demands of the other. The High Court of Errors and Appeals has, however, in the case of *Joslin v. Coffin* (5 Howard, 539), expressly adjudicated upon this point, and I have, in other cases, frequently exercised the power.

2. The second point is not altogether free from difficulty.

The declaration was filed in the Warren Circuit Court, on the 27th of September, 1840; the first writ of *capias ad respondendum*, was returned "not found." An *alias* writ, however, was executed upon the complainant, on the 27th day of February, 1841, and was returnable on the third Monday of the ensuing April. At that term of the Court, judgment by default was taken against him. Is his excuse sufficient for not having made his defence at law? and what is that excuse?

He avers in his bill, that of the service of the writ he knew nothing, his only knowledge of the suit was derived from a letter to him from his retained attorney, to attend to his business generally, informing him of the pendency of the suit, and inquiring his defence, if he had any; that he is himself unable to read, advanced in years, and the resident of a different county from that in which the suit was pending; that upon the reception of his counsel's letter, he instructed his son to write his defence to his attorney, which was done; but that the letter was miscarried upon the way, and never reached its place of destination; that had the letter arrived safely, it would have been in time to have arrested the judgment by default, and he could have made his defence at law.

The general rule is, that the party applying for the aid of a court of equity, to obtain a new trial at law, must show that he has been guilty of no negligence; that he has been prevented by fraud, or by accident beyond his control, from making his defence at law. Does the complainant bring himself within the rule? I think he does. He could have no reasonable expectation that his letter

would miscarry. That letter communicated his defence to counsel. By operation of law, had an ordinary plea of *non assumpsit* been filed, the cause would have been continued. It would not have been ready for trial at the return term of the writ. He had every reason to believe his counsel was in possession of his defence, and he had a right to repose upon that belief. He did not ascertain the existence of the judgment against him, until after the term of the court at law had elapsed, at which the judgment was rendered ; that court had no longer any power in the matter, and his application to this Court was coetaneous with his knowledge of the existence of the judgment ; to deny him the right to make his defence, would be to exact a degree of vigilance and diligence, which the most prudent and careful man, in the full exercise of youth and intelligence, would not ordinarily exhibit. I think, if his defence is a good one, he should be permitted to make it ; and this brings me to the third question raised by the demurrer.

3. Is the defence he proposes to make a good one ?

It seems that the plaintiff at law sued upon a note, made by Henry Green, now dead, as principal, and the complainant and two others as sureties, payable to the Mississippi Union Bank ; the suit was brought for the use of Anthony V. Winans, who was the real plaintiff. The bill avers, that this note was made for discount at the Union Bank, that the discount was refused by the bank, and that, without the knowledge or consent of the complainant, the note, after it was "*functus officio*," was transferred to the defendant Winans, in payment of the debt of some third person, other than the said Henry Green, the principal in the note, and that Winans well knew the note was void. The complainant states, also, that he had never heard of the note after the bank had refused to discount it, until he was sued upon it at law. In this state of fact, is the complainant liable upon the note ? I think not.

However I might, upon general principles, be inclined to think the law should be, I cannot doubt, since the adjudication of the High Court of Errors and Appeals, in the case reported in 5th Howard, of the *Commercial Bank of Natchez v. Claiborne and others*, that where a note is made to be discounted by one person, who refuses to discount it, and it is afterwards discounted by another,

Herring v. Winans, et al.

with full knowledge of the facts, that the makers of the note are liable to the holder. But I apprehend it will be found, upon an examination of that case, and the reason and principle upon which the decision, both in that and the cases in New York, recognizing a similar doctrine, are based, that the case now before me is clearly distinguishable from both, rests upon a different basis, and cannot, by any analogy that I can discover between them, be determined in the same way.

As the cases from New York, and the decision of our own Court, have been pressed upon me in the argument, I will briefly state what I consider to be the distinguishing feature of the present case, and the distinction between this and the cases to which I am referred.

The case of the *Commercial Bank of Natchez v. Claiborne and others*, 5 How. 303, was briefly this : Claiborne had made his note for discount at the bank to which it was payable, with the proper sureties upon it ; the bank refused to discount it, and Claiborne took it to Briggs, Lacoste, & Co., who gave him the money upon it. The Court say, that Briggs, Lacoste, & Co. shall recover upon the note. Why ? because the note was made for Claiborne, and Claiborne had the benefit of it. It was executed to raise money for the benefit of the principal ; it accomplished its object ; what room, then, was there for complaint on the part of the sureties ? Their liability was neither abridged nor enlarged.

The case of the *Bank of Rutland v. Beck*, 5 Wend. 66, was decided upon the same principle. The bank refused to discount the note, and the principals in the note delivered it for their own use, and to secure a debt of theirs, to a third person : the note was made for the benefit of the principals ; they receive the benefit of it. And that is the principle which runs through and regulates all the cases on that subject.

I do not find myself without authority in the view I take of this case. The defendant obtained the note, according to the averments of the bill, from some one who had no authority to it. He did not get it from the principal debtor, but from some third person, not a party to the note. He is not a *bond fide* holder without notice : the note is payable to the Mississippi Union Bank, and is not indorsed : the defendant is of course, therefore, affected with all the

Herring v. Winans, et al.

equities of the complainant ; and if neither his principal nor himself had the benefit of the note, by what reason, or upon what principle, shall the defendant, who has full notice of these facts, be permitted to coerce of the makers the amount of the note ? By what authority does he hold it ? Whence did he derive his title to it ? These are pertinent questions, which he must answer, before he can be permitted to recover upon the note.

In the case of *Woodhull v. Holmes*, 10 John. 231, the note was executed to be discounted in bank, but was put into circulation by fraud, and the Court says : "in such case, the holder is bound to show himself a *bonâ fide* possessor." In the same volume, I find a case very similar to the one before me : that of *Denniston v. T. L. Bacon*, and another, 10 John. Rep. 198. In that case, an agreement was made between the maker and payee, that the note should be discounted in bank, on certain terms ; the bank refused to discount it, and it was passed off by the payee and negotiated, without notice of the particular agreement upon which the note was to be discounted ; and the Court held the maker of the note discharged from it. The assignee did not obtain the note in the due course of trade.

I find, also, the case of *Adams Bank v. Jones*, 16 Pick. 574, and the case of *Valetie v. Parker*, 6 Wend. Rep. 615, are both decided upon the distinction I have laid down, that the note must be discounted for the benefit of the person for whom it was made, where the party taking it has notice of the object of the creation of the note.

I might extend this review further ; but I apprehend no case can be found, at least, the researches of counsel and my own investigations, have furnished me with none, where a surety upon a note made for a particular purpose, has been held liable, where the note has been entirely diverted from the design for which it was originally made, and been, with the full knowledge of the party taking it, appropriated to a wholly different one. In such case, neither the principal nor surety would be bound.

If the defendant Winans is a *bonâ fide* holder of the note, it is a defence peculiarly in his power and knowledge to make ; and I have repeatedly held, that where a party designs to protect himself

Herring v. Winaans, et al.

under the defence of being a *bona fide* purchaser for a valuable consideration without notice, it is a defence which he must set up himself, and that it is not necessary for the other party to charge him with notice.

The demurrer in this case must be overruled, and leave given to answer in sixty days.

Mercer v. Stark.

DECEMBER TERM, 1841.

**WILLIAM N. MERCER, ADM'R OF B. FARRAR, DECEASED, v.
THEODORE STARK.**

A court of mere errors and appeals cannot take original cognizance of a bill of review. A bill of review can only be filed in the court in which the original decree, sought to be reviewed, was made.

If a bill of review is sustained, in a case which, when decided, was ready for final hearing, but in which the court erred in rendering the decree merely, the whole case is not thereby reopened, but the Court will only correct the error in the decree, so as to make it conform to the law.

If a bill of review is sustained because the case, when submitted, was not in a proper attitude for final hearing, then the whole case is open for re-examination.

To enforce a specific trust upon real estate, from loose and equivocal expressions, made by one of the parties, in mere social conversations, held at different times, would be inequitable, and contrary to the spirit and policy of the statute of frauds.

The existence of an express trust, necessarily excludes the idea of an implied trust, in relation to the same thing.

IN the year 1828, Wm. N. Mercer, administrator of B. Farrar, deceased, filed his bill to foreclose a mortgage given by defendant to Farrar, dated October 19th, 1824, upon a tract of land on the waters of Bayou Sarab, in Wilkinson county, containing 2000 acres (the title to which was then in controversy between the heirs of Robert Stark and James Mather), to secure the payment of a promissory note for \$5000, with interest thereon at 10 per cent. per annum, from the 1st day of March, 1821, until paid, said note bearing date 31st of May, 1821, or 1825.

Stark filed his answer on the 22d of February, 1830, and admitted the execution of the mortgage and note, except that the date of the note was mistaken, and stated, that, at the period of the execution of the mortgage, the defendant was pressed with executions amounting to about \$7000, and that Farrar, to relieve him from his embarrassment, agreed to purchase his real and personal property under said executions, which are specified in exhibit 1, to the bill; that Farrar agreed to purchase and hold said estate for the use and benefit of said defendant, and that he would

Mercer v. Stark.

not sell the land for less than \$8000. That, for ten of the slaves levied on, he would allow defendant \$100 per annum, clear of all expenses, for each of said slaves, and restore them to the defendant when the debt due on said mortgage, and the debt about to be contracted in the purchase under the executions, should be paid. The answer of Stark set out at great length, and with particularity, the further agreement between himself and Farrar, but it is not deemed necessary to give any more detailed statement of it.

Stark states, also, that in pursuance of this agreement, Farrar purchased said property through the agency of James R. Cook, who took the title in his own name, but as defendant; believed as agent only, and to carry into effect the stipulations referred to: that Farrar took possession of the property, and after his death, said Cook, at the instance of Mercer, Farrar's administrator, sold the real estate to James A. Gerault, the bargain having been made between Mercer and Gerault previous to giving the deed, and Gerault having notice of the equitable claim of the defendant. That said land and slaves, mentioned in exhibit 1, sold at a great sacrifice at the time, from an idea prevailing at the time, that the property was to be purchased in for defendant's benefit.

This answer was made a cross-bill, and prayed that an account might be taken of said real and personal estate, and of the hire of said negroes, and the agreement specifically executed, and the benefit of the agreement allowed defendant, by way of offset to the mortgage debt, and a decree for such balance as might be found due him.

W. N. Mercer answered the cross-bill July 6, 1830, and denied all knowledge of the agreement, and denied the execution by him of any parts of the agreement, and stated that the land was sold on a credit to James A. Gerault, for 7 or \$8000.

J. A. Gerault's answer was filed July 6, 1830; he denied the agreement from his entire ignorance of it; states that Farrar, some time after the sale, offered to sell to him for \$6000, and stated to him, Stark, or his relation, had made proposals to purchase at \$5000; that though he was a friend to Stark, he had suffered enough, and desired to get rid of the application, and that he purchased to secure himself; that he, Gerault, gave \$7500, payable in two annual

Merder v. Stark.

installments with interest ; that he purchased in 1825, without any knowledge whatever of Stark's claim.

On the 19th February, 1829, Carter Beverly's deposition was taken : he stated, that Farrar was his son-in-law : that he had many conversations with Farrar, about his purchase of Stark's land and slaves. He uniformly stated, he purchased to save the claim he had against Stark ; he purchased with no view of availing himself of any kind of advantage whatever of him, and that it was perfectly understood between them, that Stark was at liberty to redeem them at any time ; and, in case of his failing to do so, any sale or sales of the property bought by him, over and above his claim, was fully and fairly intended to go, and should go, to the future benefit of the said Stark ; that they were mutual friends, and his object was to serve him all he could. That he frequently told witness, there was a full understanding between the defendant and himself as to the precise terms upon which he purchased the land, repeating to him, as often as he spoke of it, that in any sale he might make of it, he intended and would certainly pay over the surplus to Stark, believing, as he did, that it would command a greater price than he gave for it. That Stark well knew he would take no advantage of him. Stark, said he, poor fellow, has been unfortunate, and has, I know, full confidence in me, and I have neither the disposition to deceive him, or any view whatever of benefiting myself to his prejudice, by any disposition I may make of his property. I am fully convinced, I shall sell it for much more than I gave for it. The precise amount he would ask for it, even in the event of sale, the witness did not recollect.

It is not necessary to the proper understanding of the opinion of the Chancellor, to give at greater length the evidence of Beverly, or notice that of the other witnesses.

Upon the bill, answers, cross-bills and answers, and the various exhibits and proofs in the cause, the case was submitted to the judges of the old Supreme Court, for the reasons given in the Chancellor's opinion. They gave a final decree in the case, and sent it back to the Chancery Court.

Stark afterwards filed, in the old Supreme Court, a bill for a review of that decree ; which was decided by the High Court of

Mercer v. Stark.

Errors and Appeals, after its organization under the new constitution. They sustained the bill for a review.

Their opinion, and the report of the case (*Stark v. Mercer*), is to be found, 3 How. Rep. 337.

The review of this decree of the old Supreme Court having thus been ordered, the cause came on again for trial, before the present Chancellor, and was once more submitted for final decree.

M' Murran, for complainant Mercer.

Complainant contends that this Court will confine itself to the error which the High Court has decided to exist, and to that alone. But if the Court will review the whole cause, from beginning to end, I am prepared to enter upon it.

There is no difficulty as to the debt due Mercer's intestate, and the mortgage sued on ; Stark admits it. But the questions grow out of the defence set up by way of answer and cross-bill ; that complainant's intestate was to allow Stark to redeem other land and negro slaves, purchased by the former at a sale of Stark's property under execution.

Now our first answer to this, is, that the proof does not make out this statement. It is positively denied by Mercer and Girault, in answer to Stark's cross-bill, and the evidence wholly fails to establish it ; and Beverly's long "rigmarole" is indefinite and contradictory, and does not, from beginning to end, state that the purchase by Farrar constituted a part of the consideration or inducement that moved Stark to execute the mortgage on other land to Farrar, and which Stark makes as a part of the *res gesta*, but which is unsupported by any proof.

But, admitting that such an agreement as stated were proved, and could be made available in a court of law or equity, how can it be set up as a defence in this suit ? It is distinct, and has nothing to do with it. Stark blends the two transactions in his answer and cross-bill ; but this is denied by Mercer and Girault, and is unsupported by a tittle of proof. Then such a defence must fall to the ground, for this reason. If I instituted a suit to foreclose a mortgage, could the mortgagor set up that he was authorized to redeem other property, by way of defence ? It would require a distinct original proceeding by bill on his part.

Mercer v. Stark.

But again, admitting that there is an agreement, it is void, and cannot be enforced, for two very obvious reasons.

1. There is no consideration to support it.
2. It is in violation of the statute of frauds.

Where is the title of consideration in the testimony, that Stark was to pay or make good to Farrar? Will it be said that Stark was to pay out of the property, the money Farrar paid for it? or that he had to pay it up before he redeemed it? This is no consideration at all. Besides, was Stark bound to do this? was there a mutual agreement mutually obligatory? could Farrar enforce Stark to redeem? &c. No. It will not work both ways. It was a *nudum pactum*. 4 John. Rep. 235.

So it is equally in violation of the statute of frauds. Rev. Code, 192; 5 Cow. Rep. 162; (*Van Augustine v. Wimble*) 6 Vesey, 662. And this authority shows that there can be nothing like a resulting trust here: that can only arise where a party has made a purchase with the money of another. See 2 John. Ch. Rep. 409, directly in point. See Walker's Rep. 451, where this cause was fully decided, and that upon correct principles.

Where past performance is relied on, the proof must be clear and distinct, &c. 1 John. Ch. R. 132.

Winchester, for defendant Stark.

The case of *Boyd v. McLean*, 1 John. Ch. Rep. 591, is a strong case in favor of defendant Stark. It is like this in almost all its features.

Boyd, the complainant, claimed upon the ground, that the land was paid for by 1500 dollars borrowed from McLean, the defendant, and that McLean took the title from Calden, the vendor, in his own name, the better to secure the payment of the money loaned.

The proof was, that in 1802, Ross, as agent for defendant, agreed with complainant, that defendant would lend him 1500 dollars, and that the deed should be executed to defendant to avoid some judgments that might have the preference to a mortgage; and that defendant only wished the money secured, and it might rest for two or three years: confessions of defendant proved the fact of the loan, and of the taking of the deed in his own name, the better to secure the money.

Mercer v. Stark.

In 1809, '10, and '12, declarations, that he wished to take no advantage of the plaintiffs, and wished to save them the lot, and entered into the business to oblige them, were proved. The defendant denied the loan, and any contract on the subject. He admitted a parol observation, that if he would repay the 1500 dollars, he would let him have the land. Ross, so far as he acted as agent, denied the loan, or contract ; and the Court held, under the facts, the complainant entitled to the relief he asked.

Upon the similar proof in this case, to be found in the record, a similar decree should be given.

CHANCELLOR. On the opening of this cause, it struck me on the very threshold of the argument, that the steps heretofore taken in it placed it in a posture, at once novel and embarrassing, as to what further action, if any, should be taken by this Court. The subsequent reflection which I have bestowed upon the case, has served to strengthen, rather than remove my first impression. The case was originally instituted in the Court of Chancery existing under the old constitution. One of the original counsel having been elevated to the Chancery bench, pending the case before that court, it was transferred, according to the provisions of a statute upon that subject, to the then existing Supreme Court, whose duty it was made to decide the case, and certify their decision back to the Court of Chancery, to be entered as the final judgment of that court.

The Supreme Court proceeded to pronounce an original decree, foreclosing the mortgage, and directing a general execution for any balance that the mortgaged property might fail to bring ; which decree was certified to the Court of Chancery. The defendant afterwards filed his bill of review, alleging various errors in the decree, which was placed upon the docket of the then Supreme Court.

Thus things stood until after the adoption of the present constitution, creating the High Court of Errors and Appeals, and declaring that it should "have no jurisdiction but such as properly belongs to a court of errors and appeals." The bill of review was then taken up by that tribunal, and sustained, reversing that portion of the decree authorizing execution generally, and remanding the case

Mercer v. Stark.

to this Court for further proceedings. It is not pretended, that this decision was given by that court in its appellate character. What influence that decision is to exert over the case in its present situation, has been to me a question of exceeding delicacy and embarrassment. That jurisdiction of a bill of review does not belong to a tribunal having mere appellate jurisdiction, is, I think, perfectly clear. Bills of review are classed, by Lord Redesdale, as bills in the nature of original bills. Mit. Pl. 122, (3d Am. ed.) If this is their true character ; if they partake of the nature of an original bill in chancery, it would seem difficult to sustain the jurisdiction of a court, that is declared to " have no jurisdiction but such as belongs to a court of errors and appeals." The proceeding on a bill of review is aptly distinguishable from that on an appeal, in this : a bill of review is to be heard before the same judge or jurisdiction, that gave the decree which is sought to be reviewed ; whilst an appeal is the transfer of a judgment or decree of an inferior, to a superior tribunal, the latter having the power of revising and correcting the proceedings of the former. It is obvious, that the case was not before the High Court of Errors and Appeals, by writ of error or appeal, and yet these seem to be the only channels through which a cause can be constitutionally transferred to that court. The old Supreme Court, that gave the decree to which this bill of review was filed, took cognizance of the case as a court of chancery, exercising original jurisdiction. The decree, in legal contemplation, stood, therefore, as though it had been pronounced by the Chancellor himself, presiding in equity. Would the High Court of Errors and Appeals entertain original jurisdiction of a bill of review to a decree pronounced by this Court ? Surely, they would not : and yet, I am persuaded it would be difficult, on principle, to distinguish the one case from the other. Indeed, I understand that court has decided, that they could not take jurisdiction of the cases remaining on the old Supreme Court docket, which had been transferred there under the statute referred to: their jurisdiction being more restricted by the constitution, than was that of the former court. This decision would seem to be conclusive against the jurisdiction taken by that court in the present case. The questions, whether a bill of review was in the nature of an original bill, and whether original

Mercer v. Stark.

jurisdiction of it did not belong exclusively to the same jurisdiction that gave the decree, do not seem to have been raised in the reported arguments of counsel, nor adverted to in the opinion of the Court on the bill of review. If the attention of that court had been directed to these questions, I am persuaded there would have been no doubt of the result. But that court having entertained jurisdiction of the bill of review, after reversing the decree for a mere error in law apparent upon the face of it, nothing remained but for them to correct the error, and give the decree its proper legal character. The case having been transferred from this Court by operation of law, it could only be returned here with a final decree for execution, and not for any new decree by this Court.

It does not necessarily follow, upon sustaining a bill of review for error apparent upon the face of a decree, that the whole case is opened up, for examination *de novo*. Where a case is ready, in all its features, for a final decree, and the Court commits some error in rendering that decree, it should, upon sustaining the bill of review, proceed at the same time to correct the error, so as to make the decree conform to the law of the case. If, however, the error complained of arises from the fact that the case was not in a proper attitude for final hearing, and a bill of review is sustained, then the whole case is open for reexamination. These views of the practice upon this subject may be thus illustrated: — Suppose a decree rendered against an infant, without giving him a day to show cause against it; for this error it would be reversed, by a bill of review; but the case would not thus be opened for a general rehearing; the Court would, by the same sentence which declared a reversal of the decree, proceed to correct the error complained of. On the other hand, if a decree by default was rendered against an infant, and this fact appeared, it would be error, for which a bill of review would lie; and in that instance, the case would stand open for further proceedings; because something would have to be done by the parties, to put the case in an attitude for final hearing. Upon a bill of review for error on the face of the decree, no investigation on the merits can take place, not even though the matters decreed are contrary to the proofs in the cause. *Milish v. Williams*, 1 Vernon, 166. In the language of Lord Eldon, "the question is not, whether the cause is

Mercer v. Stark.

well decided, but whether the decree is right or wrong upon the face of it." *Perry v. Phelps*, 17 Ves. 178. In a cause, then, where the decree is reversed for error on the face of it, and where no further proceedings are required in order to a final hearing, the Court should at once correct the error, and let the decree, thus corrected, stand as the final decree of the Court. These reflections have led me to doubt whether I could take any further cognizance of the case, but as the counsel on both sides seem tacitly to have conceded that the case was properly here, I am induced (but not without great distrust of its propriety) to attempt some proper disposition of the case. It must be to make such decree, as the original one made in the cause, subject to the correction for which it was reversed. I am the more inclined to this, because satisfied with the conclusion to which the old Supreme Court came.

The testimony is extremely imperfect and unsatisfactory. There is no one of the witnesses who attempts to prove the distinct existence of any contract or agreement, as being made and agreed upon between Stark and Farrar, either at or before the purchase made by Farrar. The whole testimony upon the subject rests upon the vague declarations of Farrar, made in casual conversations, held with some of the witnesses. Indeed, those witnesses, whose relation to the parties at the time of the transaction gave them the best opportunity of knowing its character, say they heard nothing of any such contract, agreement, or trust, as the one attempted to be set up by the complainant. The testimony of Beverly proves, that Farrar "uniformly told him that he bought them (the land and negroes) for the purpose of saving the claim he had against Stark."

To the second interrogatory, he says, that Farrar "told him that it was perfectly understood, that Stark was at liberty to redeem, at any time, if he could ; and if not, the proceeds of any sale of the property, over and above his claim against Stark, were fully intended to go to Stark's future benefit." With all the affected minuteness of this deposition, its vagueness and generality are strikingly illustrative of the danger of admitting this kind of testimony to set up and establish a trust in relation to real estate. When was it "understood that Stark was at liberty to redeem, at any time, if he could ?" Did this understanding take place before, at, or after

Mercer v. Stark.

the sale ? and was it the purpose and inducement with Farrar, in making the purchase ? This same witness says, that Farrar uniformly told him, that he purchased the land and slaves to save a claim he had against Stark. Does this testimony sustain the statement of the defendant's answer, that the purchase was made "solely" for his benefit, and to be held for his use ? To enforce a specific trust upon real estate, from such loose and equivocal expressions, made by one of the parties, in mere social conversations, held at different times, would be inconsistent, not only with the spirit and policy of the statute of frauds, but with the general rules of evidence. It is necessary that the parol declarations of a trust should be clear and unambiguous, before the Court can change the absolute nature of a conveyance, and decree the execution of a trust, not expressed in the deed. *Slocum v. Marshall*, 2 Wash. C. C. R. 398.

It is not the case of a complainant alleging a particular state of facts, from which he is attempting to set up and establish a resulting trust, as a conclusion of law. Trusts are either express or implied. The one arising from contract, fixing and defining its terms, the other from implication of law, upon the presumed intention of parties. The existence of an express trust necessarily excludes the idea of an implied trust, in relation to the same thing. A resulting trust is the mere creature of equity, and cannot arise, therefore, where the parties have declared an express trust. *Peggett v. Du bois*, 5 Paige, 114.

It has been attempted to assimilate this case to that of the purchase-money of a tract of land being paid by one person, and the title taken in the name of another ; but there is no evidence to prove in this case any loan of money by Farrar, or anything approaching it.

Let a decree be prepared, directing a foreclosure and sale of the mortgaged premises.

DECEMBER TERM, 1842.

PHILIP H. TORREY v. ANN MINOR, et al.

A covenant of general warranty, binding the grantor and his heirs, in a deed of bargain and sale of real estate, is a real covenant running with the land, and ensues to the benefit of all subsequent purchasers.

S. G. sold by deed of warranty, binding himself and heirs, a tract of land to M., who intermarried with A. G., one of the heirs of S. G.

M. alienated the land, and died; his widow applied for dower in the land so sold to her husband; *held*, that she was not entitled to dower therein.

A statute of limitations of possessory actions, embraces an application for dower.

The right of a widow to dower, in the property of her deceased husband, until ascertained and admeasured by metes and bounds, is a mere potential interest, amounting to nothing more than a *chance in action*, and cannot be seized and sold, under an execution at law.

THE bill in this case states, that one Stephen Minor, since deceased, in his lifetime was seised of a certain tract of land in *fee simple* in Claiborne county on the South Fork of Bayou Pière, of 770 acres, on which he resided previous to August, 1814; that previous to that period, he intermarried with one Ann Gibson, who is made a defendant to the bill; that Joseph Briggs, sheriff of Claiborne county, by virtue of an execution against Stephen Minor, levied on said tract of land, and on the 24th August, 1814, by virtue of said execution, did seize and sell said land to one Samuel Gibson, now deceased, for \$500, and executed his official deed duly acknowledged and recorded, which was made an exhibit to the bill; that the said Samuel Gibson and his wife, on the 19th October, 1815, deeded said land to one John Murdock for \$2000, which deed, duly acknowledged and recorded, is also exhibited; that said John Murdock died, and by his will appointed Esther Murdock and others his executors thereof, with power to sell his real estate; that his executors, on the 9th December, 1828, did sell and convey the said tract of land to Robert L. Thockmorton and Daniel Vertner, for the sum of \$16,000, which deed was duly acknowledged and recorded; that said Daniel Vertner and wife, did, on the 9th November, 1836, sell said land to Alexander Torrey, for \$13,556·26, and executed a deed thereto, which was duly

Torrey v. Minor, et al.

acknowledged and recorded, and filed as an exhibit to the bill; that said Thockmorton sold his portion of the same land to the said Alexander Torrey, and acknowledged the deed thereto, on the 4th June, 1839, and which was duly recorded, and is filed as an exhibit; that said Alexander Torrey did, on the 19th November, 1840, sell said land and other property to the complainant Philip H. Torrey, by deed, which was duly acknowledged and recorded, and is made an exhibit. The bill further stated, that Stephen Minor had been long dead, and Ann Minor was his widow, and that she was the daughter and one of the heirs of Samuel Gibson; that Stephen Minor died without offspring; that Ann Minor, at a term of the Probate Court of Claiborne county, filed her petition to have dower in said tract of land allotted to her, which was received and admitted to record in the Probate Court. The bill also alleged, that the President, Directors, & Co. of the Grand Gulf Bank recovered a judgment on the 12th December, 1840, in Claiborne county, against Ann Minor, *et al.* for \$928.32; that on the 22d of December, 1840, execution issued on the same, returnable to May, 1841, which was levied on all the right, title, claim, and interest said Ann Minor had in and to said tract of land, which was her dower interest; that said execution was returned, and a *venditioni exponas*, issued, returnable to November, 1841; that the sheriff had advertised said land for sale, under it, and would sell, if not restrained; that the Bank of Port Gibson was also a judgment creditor of said Ann Minor, and claimed a lien on the property; that the Probate Judge had not appointed commissioners to set off said dower of Ann Minor, in said land, and that no further action had been had since filing said petition, and order thereon; that if said Ann Minor is entitled to dower in said land, it is not identified in quantity or quality, but is a *chose in action*, and not bound by judgments, and cannot be levied on; that Samuel Gibson, father of Ann Minor, by the conveyance exhibited with the bill, covenanted and agreed with John Murdock, that he would warrant and forever defend a title in *fee simple* to said land; that the covenants of Samuel Gibson are covenants that run with the land, and follow it into the hands of the most remote grantee thereof; and that the complainant is entitled to the protection of the said covenants

Torrey v. Minor, et al.

against Samuel Gibson, his heirs, &c. ; and that the said Ann Minor, as daughter and heir of Samuel Gibson, is bound to protect said covenants ; that Samuel Gibson has been long dead ; that he left a large estate, divided among his children, and heirs-at-law ; and that Ann Minor received a share of it, worth \$6000 ; that said tract of land is in a high state of cultivation, and valuable buildings are erected on it since said sale by Briggs ; that all the heirs are insolvent, some dead, and some non-residents of the State ; that said Ann Minor is the only heir in possession of property, but that she has mortgaged it, and is insolvent. The bill prays for a perpetual injunction to restrain said Ann from having said dower assigned, and from selling the same, and to restrain the sheriff and banks from selling under execution ; and on hearing, that the dower may stand as security and indemnity, for the protection of the covenants of Samuel Gibson, and as an offset thereto, whereby the same may be cancelled ; or that the twenty years' adverse possession charged in the bill, may be adjudged and decreed to bar the right of dower of said Ann Minor in said land, the said Ann having resided in the neighborhood over twenty years, seen valuable improvements made on the land, and not having claimed dower in the same for more than twenty years since her right accrued.

Process was served on the defendants, and they failed to answer, and *pro confesso* were accordingly taken against all of them, and the case submitted for final hearing.

Thrasher and Sillers, for complainant.

This is a bill filed to defeat Mrs. Ann Minor's claim to dower, which she asserts, in lands of Stephen B. Minor, sold at sheriff sale, and bought in by her father, Samuel Gibson, since deceased. Samuel Gibson in his lifetime sold the land, and warranted the title against himself, his heirs, and all other persons. The lands have come into the hands of the complainant. Samuel Gibson died, and Mrs. Minor, as one of his heirs, received a considerable portion of estate, exceeding in amount \$6000, as distributee. Her claim of dower has never been set apart to her, and yet is levied on to be sold. She is charged to be insolvent, as also the other heirs and distributees of Samuel Gibson deceased, the ancestor. Her husband has been dead upwards of twenty years.

Torrey v. Minor, et al.

1. Mrs. Minor, as heir and distributee of her father Samuel Gibson, deceased, is bound in law by the covenants of her ancestor, and is bound to protect the covenants in his deed, and the action of covenant, for a breach of warranty, lies between the most remote grantor, and assignee; for the covenant, to warrant or defend, is a covenant which runs with the land, and is intended for the benefit of the grantee, his heirs and assigns, according to the language of the covenant itself: and not even the intervention of a quitclaim deed, will defeat the action of the assignee against the most remote grantor. 5 Cow. Rep. 138, 139; 3 Marsh. 324; 2 Mass. Rep. 439.

An heir or devisee having a legal estate, is liable to an action for a breach of a covenant running with the land committed in their time, to wit, a breach of the covenant of their ancestor, according to all authority on the subject. 1 Chitty on Pl. 43.

2. If Mrs. Minor obtains dower, or the benefit of dower in the lands, it will work a breach of her father's covenants, which she is bound to protect; and a court of equity will restrain such breach, and hold the dower as security against it; especially as she and the other heirs are insolvent. Courts of equity will entertain an injunction where an action at law for a breach of the covenant will not afford an adequate compensation in damages. 2 Story's Eq. 26-29.

Injunctions will be granted to compel the due observance of personal covenants, when there is no effectual remedy at law, as in the case under consideration, when the ancestor is dead, and his estate distributed, and his heirs all insolvent. 2 Story's Eq. 225.

A court of equity will interpose to prevent breaches of a covenant, although such breaches may be recompensed by action of covenant; a court of equity will interpose to prevent unnecessary litigation. 2 Story's Eq. 187; 2 Vesey and Beames, 302.

Again, the Court will entertain the bill on the doctrine of set-off. A court of chancery will entertain a suit for an equitable set-off, of one judgment against another. 4 Paige, Rep. 647; 2 Bibb, 233.

An insolvent debtor will be compelled in equity to make a set-off with his creditor. 1 Bibb, 519; Littell's Sel. Ca. 488; 4 Littell, 155; 1 Monroe, 194; 3 Monroe, 87; 7 Monroe, 455.

Torrey v. Minor, et al.

If Mrs. Minor obtains dower in the land, or the benefit of it, it breaks her father's covenant, by which she is bound. If that covenant is broken, Mrs. Minor is liable to all the grantees of the land, and becomes emphatically a debtor, and, being insolvent, comes fully within the above rule.

3. The claim of dower, not having been asserted for upwards of twenty years, and the property having been in the adverse possession of innocent purchasers all the while, who procured titles and proceeded under the eye and observance of the widow to make valuable improvements, without a knowledge of her claim, she will be barred of her claim of dower, and perpetually enjoined from asserting the same by a court of equity. 6 Johns. Ch. Rep. 194.

4. The claim of dower cannot be levied on by an execution, because the dower has not been laid off, or set apart to the widow. At law the widow's right of dower, previous to an assignment thereof, is not an estate or freehold in the land of the deceased husband; but is a mere right or *chose in action*, and cannot be sold on execution. 4 Paige, Rep. 448; 13 Wend. 526.

5. The title to the lands from Samuel Gibson to the complainant is perfect, the titles being made by the grantees of Gibson, with the exception of John Murdock, who died owning the land. But he left a will empowering his executors to sell his real estate, which they did, and which it was perfectly competent for them to do. 2 Story's Eq. 320; 14 John. 527; 15 John. 346.

CHANCELLOR. The complainant derives title to the tract of land in controversy, indirectly, through Samuel Gibson, deceased, who conveyed by covenant of general warranty to his vendee, binding himself and heirs. This was a real covenant running with the land, and, upon well settled principles, enured to the benefit of all subsequent vendees. This land was subsequently sold and conveyed, through an intermediate vendee, to Stephen Minor, who had intermarried with Ann Gibson, one of the heirs of said Samuel Gibson. After the death of Minor, she filed her petition in the Probate Court of Claiborne county, to have her dower allotted to her in the land, which petition was allowed, but no allotment has

Torrey v. Minor, et al.

been made. The Grand Gulf and Port Gibson Banks, having judgments against Ann Minor, have levied their executions upon her dower-right, and threaten to sell the same. The object of the bill is to enjoin these sales, as well as to enjoin the widow from further prosecuting her claim of dower. I have no doubt of the complainant's right to relief, as to all the parties. Ann Minor is barred of her dower-right. 1. Because she is estopped by the covenant in the deed of her ancestor, Samuel Gibson, which is equally binding upon her as it was upon him. The covenant would be binding upon her, to the extent of assets descended from her father, even if the title of the complainant was successfully assailed by a third person.

2. The covenant in the deed is her own covenant, and a court of equity will interpose to prevent a breach of covenant, where irreparable damage would follow such breach, as would be the case here, since it is alleged that the defendant Ann Minor, and all the other heirs of Samuel Gibson, are insolvent.

3. She is barred by the statute of limitations, twenty years having elapsed from the death of her husband before the time of the application for dower. An action for dower is a possessory action, and is within the statute on that subject, there being no exception as to possessory actions.

In regard to the creditors of Ann Minor, it is sufficient to remark, that even if she had herself a right of dower, yet while it remains unascertained, and until there has been an actual admeasurement, by metes and bounds, it is a mere potential interest, amounting to nothing more than a *chase in action*, which cannot be the subject of seizure and sale under an execution at law.

Let a decree be prepared granting a perpetual injunction against the claims set up at law by the defendants.

DECEMBER TERM, 1843.

MONTGOMERY, *et uxor v. MILLIKEN, et uxor et al.*

As a general rule, a suit for the recovery of a legacy, should be brought against the executor, in the jurisdiction having cognizance of the will; yet, when the fund, out of which the legacy is payable, is traced to the possession of the heir of the testator, in a different jurisdiction from that having cognizance of the will, the suit may be maintained there.

Where a will, made in another State, is probated there, and the testator has property in this State, and a copy of the probated will is admitted to probate in this State, according to the statute (How. & Hutch. 388); in a suit for a legacy under the will, brought in the courts of this State, a certified copy of the probated copy of the will, from the Probate Court in this State, will be admissible evidence.

Where a legacy was given, payable out of a fund in Louisiana, and the testator had property in this State, which the legatee attempted to subject to the payment of his legacy; *held*, that the property in this State could not be resorted to until the fund in Louisiana was shown to be insufficient.

Where the testator directed certain lots of ground to be sold by his executor, if, in the opinion of the executor, it should be advisable, to accomplish the purposes of the will; *held*, that this was a discretionary power conferred upon the executor personally, and could not be exercised by the administrator, *cum testamento annexo*.

Where the testator, in his will, gave the executor a discretion to sell a portion of his realty, but did not direct an absolute sale; *held*, that the realty was not thereby converted into personalty; and that a pecuniary legacy was not chargeable thereon, unless so expressly provided by the testator.

Where, by the law of Louisiana, a person who has married a second wife, and who has children by his former wife, is interdicted from leaving his widow more than one fifth of his estate, and that only as an *usufruct*; yet makes a will, leaving to his wife a large sum of money absolutely, the legacy is invalid, and the bequest void.

Where, by the law of Louisiana, it is provided, that if a disposal of property by will, exceed the *quantum*, of which a person may legally dispose, the bequest shall not be void, but shall be reduced to the amount which he may rightfully dispose; and the same law also provided, that the husband of a second wife, and who had children by a former, could only bequeath to his second wife, by will, the extent of the *usufruct* of one fifth of his estate; it was *held*, that the bequest by the husband of a second wife, who was domiciled in Louisiana, of an absolute sum of money to her, was void, and could not be reduced, under the provision of the law.

THE facts of this case sufficiently appear in the opinion of the Chancellor.

CHANCELLOR. This suit is brought to recover a pecuniary legacy, claimed under the last will and testament of David Alexander, deceased, who, at the time of his death, was domiciled in the

Montgomery, et uxor v. Milliken, et uxor et al.

State of Louisiana, but was temporarily in the State of Kentucky on a travel, where he made his will, appointing William Alexander his executor ; to whom he gave power and instructions, to sell his entire estate in the State of Louisiana, which he held in joint ownership with his wife, and his brother Thomas Alexander ; and directed that five thousand dollars should be given to his wife, out of the proceeds of that sale. The will directs, that the property owned by the testator in this State (consisting of town lots in the city of Natchez), should be sold at the discretion of the executor. This will was probated in the State of Kentucky, in the county where the testator died, and certified to the county of Adams in this State, where letters of administration, with the will annexed, were granted to the defendant, M'Alister ; the will was also certified to the Probate Court of the parish of Concordia in the State of Louisiana, where it was admitted to record, and ordered to be executed, by Thomas Alexander, as *dative testamentary* executor ; the Court having decided that the executor named in the will, being a citizen of another State, could not, under the laws of Louisiana, be allowed to act there. It appears, that the testator left at the time of his death, his wife, who since intermarried with the complainant, Montgomery, and one child by a former marriage, who has since intermarried with the defendant Milliken. The bill charges, that there has been a sale in some form of the estate in Louisiana, and that a part of the proceeds have been received by Milliken, and the remainder secured to the separate use of his wife, by means of a deed of trust from said Thomas Alexander to John P. Walworth. That the town lots in this State have been sold by the defendant, M'Alister, and that the proceeds thereof yet remain in his hands. That Thomas Alexander has refused to pay to the complainants the legacy given under the will, and prays that M'Alister may be decreed to pay whatever remains in his hands, and that the remainder may be decreed to be paid by Milliken and wife, through the trustee, John P. Walworth. The first question that presents itself, is, whether this Court has jurisdiction of the case. It was urged, that a suit for the legacy under the will could only be maintained, against the executor in the State of Louisiana, who had charge of the fund out of which the legacy is

Montgomery, et uxor v. Milliken, et uxor et al.

payable. Although, as a general rule, a suit for the recovery of a legacy should be brought against the executor, in the jurisdiction having cognizance of the will, yet, where, as in this case, the fund out of which the legacy is payable, is traced to the possession of the defendant, Mrs. Milliken, who is a citizen of this State, and who claims the fund in question as the sole heir of the testator, I can see no defect in the frame of the suit in this particular. Milliken and wife having come into the possession of the particular fund upon which the legacy is charged, they must be regarded as having taken it subject to the trust with which it was clothed in the hands of the executor from whom they received it. The counsel for the defendant made the following point upon the merits.

1. That there is no legal proof of the existence and execution of the will under which the complainants claim.
2. That if the will were proven, the assets in the hands of the defendant, M'Alister, cannot be subjected to the payment of the legacy thereiu given.
3. That the legacy to the complainant, Mary Ann, who was the wife of the testator, is given absolutely, and not merely in *usufruct*, and is therefore void under the laws of Louisiana.

1. It appears that the will in this case, although made and probated in Kentucky, was admitted to record and ordered to be executed in the State of Louisiana, upon the exhibition of a copy of the will, and probate thereof in the court in Kentucky. The laws of Louisiana provide, that a will made in any other State shall take effect in Louisiana, if it is clothed with all the formalities prescribed for the validity of a will in the place where it was made. Civil Code, Art. 1589.

It is also provided, that such will, where it appears to have been probated before the proper jurisdiction where it was made, may be executed in Louisiana, without any other form than that of having it recorded. Civil Code, Art. 1681, 1682.

The will having been recognized and acted on in the proper court in Louisiana, this Court cannot question the validity of its execution and probate, so far as it affects property within that State. The evidence offered in this case, to establish the existence of the will, consists in a certified copy from the records of the Probate

Montgomery, et uxor v. Milliken, et uxor et al.

Court of the county of Adams, showing, that a certified copy of the will from the court in Kentucky, had been admitted to record in this State. It is said that this evidence is inadmissible, because it is a mere copy from a copy. The statute provides, that an authenticated copy of a will made in another State, may be admitted to record in this State. How. and Hutch. 388, sec. 13. It is also provided, that certified copies of all instruments, which are permitted or required to be recorded, shall be received in evidence in any court of law or equity in this State. (How. and Hutch. 610, sec. 34.) These provisions, I think, remove the objection referred to.

2. Upon the second point, I think it clear, that the proceeds of the town lots in this State cannot be pursued in the hands of the defendant, M'Alister. First, because the will directs the legacy to be paid out of the proceeds of the sale of the estate in Louisiana; the legacy is, therefore, properly chargeable upon that fund, and a resort cannot be had to the general assets of the testator, until that fund is shown to be insufficient. (*Patton v. Williams*, 3 Munf. R. 59; *Mayrant v. Davis*, 1 Desaus. 202.) Secondly, because I am satisfied, that the sale made by M'Alister was illegal and void. The power of selling those lots is made discretionary with the executor named in the will, and did not attach in favor of the administrator with the will annexed. It was the discretion of the executor named in the will, to which the testator confided for determining whether the estate in Mississippi should be sold or not, and not the discretion of one who might be appointed administrator with the will annexed. Hence, we find it has been decided, that where an executor is vested, by the will, with power to sell lands belonging to the estate of his testator, this power cannot be exercised by an administrator with the will annexed. (*Brown v. Hobson*, 3 Marsh. Rep. 380.) The will not directing an absolute sale of the lots, they are not to be regarded as converted into personalty, but as having descended to the heir-at-law; and no rule is better established, than that a pecuniary legacy is never chargeable upon real estate in the hands of the heir, unless such intention is clearly expressed by the testator.

3. The next question is, whether the legacy, in the form in which

Montgomery, et uxor v. Milliken, et uxor et al.

it is given, is sanctioned by the laws of the State where the testator was domiciled at the time of his death. This must determine the right of the complainants, as against Milliken and wife. It appears, that the legatee was the second wife of the testator, and that he had one child by his former marriage. By the laws of Louisiana, a man who contracts a second marriage, having children by a former one, cannot give to his wife exceeding one fifth of his estate, and that only as an *usufruct*. Civil Code, Art. 1754 ; 7 Louisiana Rep. N. S. 665.

The Civil Code provides, that a disposal of property by will, exceeding the *quantum* of which a person may legally dispose, to the prejudice of forced heirs, shall not be void, but shall be reduced to the amount of which he may rightfully deprive such forced heirs. (Art. 1489.) This reduction is made by deducting the debts of the testator from the value of his property at the time of his death, and calculating what is called the "disposable *quantum*," or the remainder. Civil Code, Art. 1492. But these provisions seem to me to have no application whatever to a case like the one before me. The very mode pointed out for making the reduction, shows that a case like this was not within the contemplation of the lawgiver. The objection here is, that the will gives to the legatee a greater estate or property in the legacy itself, than is authorized by the laws of the testator's domicil. If I correctly understand those laws, the only interest which a husband in such case can give the wife is an *usufruct* in a portion of his property, not to exceed one fifth. The legacy given in this case, is one of absolute property in the thing given ; can the Court undertake to change the nature of the legacy, by reducing it from one of absolute property, to one of a mere *usufruct*? or must the legacy fail altogether as an invalid disposition? The law has furnished no mode for reducing an absolute gift of property or money into a mere *usufruct* in that property or money. Nor has the Court any power to change the language of the bequest, so as to make it conform to the laws. This would be to make a new will for the testator. I am reluctantly forced to the conclusion, that the legacy is invalid, being interdicted by the laws of Louisiana. Nothing can be clearer upon principle, than that a provision in a will, which contra-

600 SUPERIOR COURT OF CHANCERY.

Montgomery, et uxor v. Milliken, et uxor et al.

venes the provisions of a positive law, to which the testator was subject, cannot be enforced, either in the country where it was made, or elsewhere.

I have felt great difficulty in coming to a satisfactory conclusion as to the law of this case ; arising from want of acquaintance with the peculiar system of jurisprudence of the State of Louisiana, upon which a correct solution of the different questions so essentially depends.

I shall be gratified to see it submitted to the judgment of the Supreme Court.

Let the complainants' bill be dismissed at their costs.

JULY TERM, 1842.

SAMUEL SAMPLE v. JAMES C. PICKENS, et al.

S. contracted with P., and others, to do a piece of work, for a certain agreed price, and receive his pay in the notes of a particular bank, or their equivalent, the price agreed to be paid being but a fair compensation for the labor to be done ; before the work was completed, the notes of the bank agreed upon depreciated, to be worth but one tenth of their value at the time of the contract ; S. filed his bill to enforce the payment in good money, of the debt due him, which P. and others resisted, and claimed the right to pay in the notes agreed on ; held, that the great depreciation of the notes was a circumstance not looked to, or provided for, by either party ; that it would be inequitable to force S. to receive them, and that he was entitled to recover a fair price for the work done, in current money.

THE bill in this case states, that in February, 1836, Hiram G. Runnels, Malachi B. Hamer, Edmond Pursell, Israel W. Pickens, Joseph C. Pickens, and Jacob Collins, and their successors, were incorporated, by the legislature, proprietors of the town of Montgomery, in Holmes county, and authorized by the act to make a turnpike across Big Black Swamp, near said town ; and before any steps were taken to construct the turnpike, Collins's interest was sold, under execution, to James C. Bole ; and Israel W. Pickens sold his interest to W. Kirkwood, and Pursell sold his interest to Joseph C. Pickens ; which facts are stated in the bill from information. It is also stated, that the company was seised and possessed of one eighth of land, or thereabouts, including said town and a ferry across Big Black ; also pieces of land lying on the south side of said river, between the ferry and the highlands, over which the turnpike road runs ; that said Runnels, Bole, Hamer, Joseph C. Pickens, and Kirkwood, then proprietors, on the 19th of August, 1838, entered into a contract with Thomas B. Ives, to construct said road across the swamp ; that said Ives was to receive \$15,000 for constructing said road, payable in the paper of the Mississippi and Alabama Railroad Company, or the Grenada Bank, or their equivalent ; that at the time said contract was entered into, these banks, and especially the first, constituted the principal circulating medium of that part of the State ; that it was received in payment

Sample v. Pickens, et al.

of executions and debts generally, since which the paper of the said banks had become greatly depreciated ; that the Grenada Bank was worthless, and the other was worth from ten to twenty cents in the dollar only. The bill charges that the intention of the parties, at the time of said contract, was to guard against paying said sum of \$15,000 in money which was not current in that section of the State, and that the constructing said road was worth \$15,000 in current money in that section, and that the paper of said banks then furnished the currency, at the time and place when and where the contract was made ; and submits whether it would be just and right to compel him to receive the paper of said banks, now so much depreciated, in payment for his labor. The bill charges, that it was the intention of the parties that the money should be paid in current money of the country, and that the paper of those banks is not current.

It charges that said paper, at the time, was only about ten per cent. below specie, and that the contract was entered into to avoid a specie payment, or a payment in funds which were not in common circulation ; that it was not the intention of the parties or agreement, that the \$15,000, or any part of it, should be paid in money that was greatly under par, but in current money ; that by said contract, Runnels, Bole, and Hamer, being each the owner of one sixth interests, were to pay \$2500 each ; and Pickens and Kirkwood, being the owners of the half interest were to pay \$7500 ; Runnels paid his portion to Ives, being \$2500 ; and Bole paid a part of his amount to Ives — what amount complainant did not know, and called for a statement ; that Hamer refused to sign said articles, or pay anything for making the road ; but the complainant insists that Hamer is liable and bound by the contract of the others, and that his interest in the property is liable for his proportion, inasmuch as he is entitled to a part of the profits.

The bill charges, that shortly after making said contract, Ives commenced said road, and was prosecuting it to completion ; that on the 2d of July, 1839, he transferred, for value, all his interest in said contract to complainant ; a copy of which transfer is filed as an exhibit to the bill.

The bill states, that the work was so far completed before said

Sample v. Pickens, et al.

transfer, that in April, 1839, the defendants, Bole and Pickens, applied, under the provisions of the charter, to the Police Court of Madison county, to affix the rate of toll on said road, representing it to be in good travelling condition ; which was done, and copies of the application, and action of the Court in fixing the rate of toll, were exhibited ; and that said defendants have ever since been receiving toll upon said road. Complainant charges, that after said transfer, he expended \$2000 or \$3000 in completing said road, according to said contract ; and that, after completing the same in every particular, he applied to said Pickens, who represented himself as the agent for said company, for payment, agreeably to the provisions of the contract, which he refused.

The bill charges, that Bole is insolvent ; that his interest in said road has been sold under executions, and bid in by his brother-in-law, for Wm. Pickens, who is his father-in-law, with a full knowledge of his lien upon said property. The bill also charges, that said Jos. C. Pickens is insolvent, and that his interest has been sold by execution, and purchased by the defendant, Wm. Kirkwood, for \$68, with full knowledge, &c. ; and that Kirkwood and Pickens were partners in the whole or a part of their stock, at the time of said sale.

The bill charges, that Runnels, Bole, Hamer, Kirkwood, and Pickens, were an incorporated company, proprietors of Montgomery ferry and the eighth of land, including the town of Montgomery and the ferry ; and proprietors of said turnpike, and the land through which it was made ; and that said incorporated property is liable for the debts of said company, in preference to the individual debts of any of said company.

The bill also charges, that they acted in their corporate capacity in making said contract with said Ives, for the construction of said road.

The bill also charges, that the execution sale of the interests of Bole and Pickens embarrasses the title to the corporate effects of said company ; and prays that said sale may be cancelled, so as to enable him to make the corporate effects of said company liable for the balance of his debt for constructing said road. But if the Court should be of opinion that they did not act in their corporate capacity, he charges, in that case, that they are joint-partners in said

Sample v. Pickens, et al.

tracts of land and property ; and that, as such, said contract was entered into ; and that all of said property is liable to his debt, and in preference to the individual debt of every member of the partnership ; and that said execution sales only conveyed the property subject to his debt.

The bill also charges, that the profits arising from said ferry and turnpike, and all the property belonging to said corporation, is a fund, which should be appropriated to the payment of his debt ; and the purchasers, at the execution sales, of interest of Bole and Pickens, whether the defendants acted as a corporation or a partnership association, are not entitled to the profits arising from said turnpike or ferry, until his debt is satisfied ; and if it goes into the hands of Bole and Pickens, they are totally insolvent, and leaves him without any remedy at law.

The bill further states, that when complainant applied to Pickens for payment of the balance due upon the contract, he refused to pay, upon the ground, that the road was not completed according to contract, although they had been receiving toll since 1839. The bill alleges, that complainant and defendants then agreed, according to the provisions of the contract, to refer all matters in dispute to Burwell Scott, and Wm. L. Wilson, arbitrators ; that said arbitrators met and decided all matters in dispute in favor of complainant, which he relies upon as conclusive between them. He also charges, that said road was completed, according to contract, in every particular.

He prays that Hamer, Collins, Ives, Runnels, Bole, J. C. Pickens, Kirkwood, and Wm. Pickens, Sen., be made defendants, and compelled to answer ; that the profits arising from said road and ferry may be applied to his debt ; that an account be taken ; that a receiver be appointed, to take possession of said road and ferry, and receive the profits arising therefrom, report the same to the Court, and that the same be applied to the payment of his debt ; and that a sale may be decreed of such portions of said property as will be just, for the payment of the balance of his debt ; and that an injunction be granted against defendants ; that said execution sales be cancelled, and the defendants account for the profits heretofore received by them on Hamer's interest, and that the same be applied to the payment of his debt ; and that said Kirkwood and Wm.

Sample v. Pickens, et al.

Pickens discover and account for the profits received by them on the interest of Bole and J. C. Pickens, and for general relief, &c.

To this bill a general demurrer was filed, and the cause submitted thereupon.

The counsel for complainant filed no brief.

Fitch and Brown, for the defendants.

In cases of mistake, if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract so as to make it conformable to the precise intent of the parties. Story's Eq. vol. 1, 164. See also *Gillispe v. Moon*, 2 John. Ch. Rep. 585; *Lyman v. United States Insurance Company*, ib. 630. The above principle is fully recognized and admitted. But it is insisted, that there is no allegation in the bill to which the principle can apply. No mistake or fraud is alleged in drafting the contract: there is no allegation that any part of the contract was omitted to be inserted in the articles of agreement; but, on the contrary, complainant attempts to give a reason why the clause for payment in Brandon and Grenada money, was inserted. So it is evident, from his own statements, that the parties all understood in what the payment was to be made, and that they acted with deliberation and caution. It will be seen, from the cases in John. Ch. Rep. above cited, that the bills allege the mistake, and there is a foundation for the Court to proceed upon. The evidence must be confined to the points in issue in the cause, and can only be used in support of some statement in the pleadings. 1 Smith's Ch. Prac. 346.

Complainant has an ample remedy at law.

He insists, 1st. That the contract was made by the defendants, in their corporate capacity. If that be true, he has his suit at law.

2d. He insists, that if the contract was not made in their corporate capacity, it was made by them as partners. If that be true, his remedy is ample at law, and he can sue them jointly at law.

He does not state any sufficient cause why he resorts to this Court; such as insolvency, and that he has cause to believe that the fund will be wasted. If it was a partnership business, each partner is liable for the entire amount of the debt.

Sample v. Pickens, et al.

CHANCELLOR. (After reciting the facts of the bill.) The question is, shall this contract be carried into effect, according to its literal terms, or shall it be enforced by this Court, according to what is alleged by the bill to have been its true intent and purpose?

It was said, upon the argument of the demurrer in this case, that no precedent could be found, countenancing such a case as that made by the complainant's bill: this may be true, and yet it would be very far from proving that the case was therefore without the pale of remedial justice. Precedents are neither the exclusive, nor yet, perhaps, at all times, the safest guides in the path of justice. Their authority is always readily acknowledged in like cases, where they furnish a sound exposition of the law upon the particular questions adjudged. Causes are, however, daily arising, for which precedents furnish no rule, except so far as reasoning from doubtful analogies may go. In such cases, a recurrence must be had to the elementary principles of legal science. Let us see, then, whether the features of this case do not place it within the application of well-established principles of equity jurisprudence. It appears, from the allegations of the bill, that a state of things has arisen in connection with the contract of the parties, which no ordinary sagacity could have foreseen, and which renders it inequitable that the parties should be held, literally, to the terms of that contract. The rapid and ruinous depreciation of the paper of the bank, in the currency of which the contract was to be discharged, was an event evidently not contemplated by either of the parties, at the time, and therefore was not provided for by their agreement. Could the complainant have foreseen, at the date of his contract, that the currency which he had stipulated to receive in pay for his work, would depreciate to one tenth of its then value, by the time the work was completed, it is impossible to resist the conclusion, that such a contingency would have been provided against by the terms of the agreement. It is distinctly alleged, that the sum agreed to be paid, was but a fair compensation, in current money, for the work agreed to be done. It would seem, then, that to enforce this contract, literally, would be subversive, as well of the obvious intention of the parties, as of the plainest principles of justice. To relieve against contracts or agreements, on the ground of inequality, or imposed

Sample v. Pickens, et al.

burden or hardship on one party, is laid down by a learned elementary writer as a distinct head of equity. (2 Pow. on Con. 145, 146.)

It is said, in every well-constituted government, there is somewhere lodged the power of supplying that which is defective, and controlling that which is unintentionally harsh, in the application of any general rule to a particular case. (1 Fonb. Eq. 5, note.)

Courts of common law act upon contracts according to their terms, however oppressive or unequal may be the consequences. But courts of equity act upon more liberal and enlarged principles of justice. Where, from any defect of the common law, want of foresight of the parties, or other mistake or accident, there would be a failure of justice, a court of equity extends its remedial aid. And so, too, a court of equity will refuse to enforce an obligation, the object of which has failed by an event not expected or looked to by either party ; holding that it would be unjust and inequitable to do so. (Kaimes's Prin. of Eq. 80, 81, 94.) In such cases, courts of equity judge according to the presumed or implied intention of parties, and direct that to be done, which it is probable the parties themselves would have directed, had they foreseen the cause or reason for so doing. (Kaimes's Prin. of Eq. 40.) As in the case of *Newton v. Rowe* (1 Vern. 460), where a father articled his son to an attorney, and gave him £120 as the apprentice-fee, the attorney having died within three weeks afterwards, it was decreed that 100 guineas of the sum advanced, should be paid back to the father. I think, then, that the complainant makes such a case by his bill, as *prima facie* entitles him to the relief asked for. The demurrer must be overruled, with leave to answer.

Davis v. Yerby.

JULY TERM, 1842.

DAVIS, ADM'R OF NASWORTHY HUNTER, v. YERBY, EXECUTRIX OF WILLIAM YERBY.

D. filed his bill against Y., executrix of W. Y., alleging that the estate of W. H. was indebted to him; and that W. Y., while administrator of W. H.'s estate, had rendered himself liable to that estate, and sought to subject that liability to the payment of the debt of the estate to him; *held*, that the administrator, *de bonis non* of W. H., was a necessary party to the suit, the estate of W. H. not being finally settled, or alleged to be insolvent.

An administrator, who sells property of his intestate, and takes insufficient security for the payment of the purchase-money, is liable for the amount lost thereby, if he did so from *bad faith*, not otherwise.

A bill against an administrator, charging him with waste and embezzlement of his intestate's estate, must make specific and definite charges of the particular waste and embezzlement; general charges are not sufficient.

Where it is sought to charge an executor for default or negligence, the particular default must be put in issue, and established by evidence.

An administrator of an administrator cannot be called to account for the estate of the first's intestate, without proof that the estate in fact came to his hands.

Where an interval of 12 years has elapsed, since an executor has ceased to act in that capacity, and an attempt is made to bring him to an account; and he answers that he has fully administered, no decree for an account will be rendered against him.

THE bill in this case stated, that Henry Hunter died in 1822, leaving a large estate, real and personal, considerably embarrassed.

That William Yerby was appointed administrator, and reported an inventory of personal estate, amounting to \$11,457·76; and returned an account of sales, of both real and personal estate, amounting to \$21,276·42.

Beside said assets, that Yerby sold cotton of the estate, for \$383·20, and took in payment the note of Field P. Hunter, which was of no value.

That he collected \$42·75 from Quick, for which he never accounted.

That he sold, as per account of sales, property to Joseph Hunter, deceased, to the amount of \$371, and took the note of Joseph Hunter and Thomas Dawson, his security, who was insane, and the note of no value.

That he sold William Hunter property to amount of \$1726, and

Davis v. Yerby.

took his note with Thomas Dogherty security, and both insolvent, of which only \$577 was collected, the balance, of \$1149·25, lost.

That he sold to John Bell, land for \$1387·50, and took no security, and the debt lost.

That he sold Field P. Hunter property for \$183·10, and took no security, and debt lost.

That he became debtor to the estate on his own account, \$1111·22.

That Yerby afterwards died in 1824, without having paid the debts, or any part of them.

That complainant Davis was appointed administrator, *de bonis non*, and paid the debts, to the amount of \$18,366·38, being the greatest part due, and owing by Hunter's estate, and hoped to have collected enough of debts due the estate, to have paid all said debts, which he would have done, if Yerby had discharged his duty while administrator.

The bill charges, that Yerby, though large amounts of moneys and effects came to his hands, never paid the debts, but elogned, embezzled, and wasted the effects, and, by his neglect of duty, suffered to be lost and wasted, by pretended sales to insolvent persons, property to the amount of \$7968·22.

It admits he received, from Yerby's representatives, various paper accounts, demands, &c., but, by the negligence and improper conduct of Yerby, never realized enough to pay the debts, to within the amount of \$2635·92, to pay and satisfy himself for moneys disbursed by him.

That in his last settlement with the Orphans' Court, that sum, \$2635·92, was allowed him as a balance due.

That he cannot reimburse himself that amount by any assets, other than those for which Yerby, on account of his waste and embezzlement, should be made liable.

That there are other creditors of the estate not yet paid.

That Nasworthy Hunter became a purchaser, at said administrators sale, of property to the amount of \$6675, which sum was paid over to said Davis, complainant.

That Nasworthy Hunter paid a judgment, in which he was security for said Henry Hunter, for \$1309·60, with interest and costs,

Davis v. Yerby.

amounting, on the 31st of Jan. 1833, to \$2311.36, which account was duly presented to the Orphans' Court and allowed, but not paid by Davis for want of assets.

That Nasworthy Hunter died in 1834, and complainant Davis is his administrator, and now holds said claim against the estate of Henry Hunter.

That, in 1834, complainant was discharged from his office of administrator of Henry Hunter's estate, and Thomas Hunter appointed administrator, who has received no assets.

That Elizabeth Yerby is executrix of the estate of William Yerby, deceased, and has never settled and accounted for the wastes and embezzlements of the said William Yerby, aforesaid.

That complainant, claiming as a creditor of said Henry Hunter's estate, and as administrator of Nasworthy Hunter's estate, being without relief, prays an answer, and that she may account with complainant in his individual right, and as administrator of Nasworthy Hunter, of and concerning the estate of said Henry Hunter, which came to her husband's hands, to be administered, and for all the loss and injury incurred by the waste and mismanagement of said Yerby, and, out of the sum found due, decree to complainant, in his own right, and as administrator of Nasworthy Hunter, the sums claimed.

Mrs. Yerby's answer stated, that her husband was appointed administrator October 18th, 1822, and removed August 28th, 1823, for failing to give counter security required of him. He was administrator only about ten months; she states, that the heirs and distributees were principally interested in the proceeds of the estate, and that she believes the property, real and personal, was sold under an order of the Probate Court, at the instance of said Nasworthy Hunter, and the other heirs; that the property was principally purchased by the heirs, and such security taken as was satisfactory to them; she denies the several charges of loss to the estate, specified from taking insufficient security, &c., and charges the loss, if any, to the neglect of the complainant; denies the general allegations of waste, embezzlement, &c., by which a loss of \$7448.23 was occasioned to the estate; denies that the estate is indebted to Davis, for debts paid by him.

Davis v. Yerby.

States, that Davis was appointed an administrator *de bonis non*, on the 17th Nov. 1823, and that all the bonds, deeds, notes, accounts, vouchers, papers, and property of whatever kind, belonging to the estate of said Henry Hunter, so far as they came into the possession of said Yerby, and remained unadministered, were delivered to said Davis.

That John Bell is the security in the administration bond of Davis, whom he now charges with insolvency, and that the estate was embezzled by Yerby's taking him as a purchaser of land.

That Davis rendered no inventory of the estate which came to his hands until May, 1825, when he filed a statement admitting assets in his hands to the amount of \$28,681·57, none of which claims were represented by him to be desperate or doubtful, except a claim for \$6674·73 for property sold Nasworthy Hunter, which he states the heirs agreed to receive back again.

That on the 26th of April, 1829, Davis rendered an account, in which he admits he had collected \$12,594·75, and charges the estate with the sum of \$13,135, and on the 30th of June, 1830, rendered a second account, in which he admits a further collection of \$233·77, and charges the estate with the sum of \$309·73, showing an amount, admitted to be collected by him, of \$12,828·52; a sum exceeding, as defendant believed, the whole amount of debts due by the estate, at the time Davis was appointed administrator *de bonis non*.

That it appears from admissions of Davis, in his bill, and from his said last account and vouchers accompanying it, that he collected a large sum from Nasworthy Hunter, for a part of which he has never accounted.

Denies that Henry Hunter's estate is indebted to Nasworthy Hunter the sum of \$2311·36, for moneys paid by said Nasworthy, on a judgment, as security for Henry, or that there were not assets to pay; but avers, that in a settlement of accounts between said estates, a large balance was found due from said Nasworthy to said Henry, which balance was collected by Davis and never accounted for, as defendant believes, but, if not collected, is still due and owing the estate of Henry Hunter.

Avers, that many of the debts said Davis alleges he paid for

Davis v. Yerby.

Henry Hunter's estate, were contracted since the removal of Yerby from the administration.

Avers, that on the last account of Davis with the Orphans' Court, a large item for interest is allowed on account of advances made in payment of debts, which ought not to be allowed, because he at all times had sufficient funds to pay said debts ; she denies the correctness of said accounts, and calls upon him to produce the vouchers.

Avers, that Davis has never made a final settlement of his accounts with said estate, and that, when he does, he will be found largely indebted to said estate, as she believes ; she makes an exhibit of the record of the proceedings in support of all her statements.

She admits, that after the death of her husband, she never rendered an account of his administration, as her husband was removed before he had fully administered upon any part of the estate ; but, as far as he had administered, had rendered an account of his actings and doings, by returning an inventory and account of sales, and all the assets, thus remaining unadministered, were delivered to said Davis, and she has never been cited to render any further account.

That for all the matters claimed in this suit, Davis sued her at law, and a final judgment was rendered against him in the Supreme Court, which she insists on as a bar ; she also makes her answer a demurrer, and asks leave to rest on her demurrer at the hearing of the cause.

No proof was taken by either party, and the case was submitted for final decree.

Henderson, for complainant.

Winchester, for defendant.

Complainant's claim to call Yerby to an account for a maladministration of the estate of Henry Hunter, in taking insufficient security for the purchase-money of lands and personal property, sold under the order of the Orphans' Court, is based solely upon two facts.

1st. That Davis, as administrator *de bonis non*, has paid debts

of the estate of Henry Hunter, to an amount of \$2635·92, beyond the assets which ever came to his hands. That he paid, under an expectation that he could collect, out of the notes, &c., delivered to him by the former administrator, enough to pay all the debts ; but that, owing to the maladministration of Yerby, these notes, &c., turn out to be insufficient to indemnify him for the debts he paid.

2d. That there is also a debt due Nasworthy Hunter, of \$2311·36, with interest from the 31st of January, 1833, from the estate of Henry Hunter, which has not been paid, because there are no assets to pay, for the same reason of maladministration on the part of Yerby.

Suppose these facts existed, could Davis, as a creditor of the estate of Henry Hunter for debts paid by him as administrator *de bonis non*, beyond assets which came to his hands, and for a debt due him as administrator of Nasworthy Hunter from the estate of Henry Hunter, come into a court of chancery to charge Yerby with maladministration, waste, and embezzlement, in taking insufficient security for property sold ?

2d. But it is denied the estate of Hunter is indebted to Davis, for debts paid by him beyond assets which came to his hands, or that, in the settlement of the accounts between the estate of Henry Hunter and Nasworthy Hunter, the estate was indebted to Nasworthy ; but on the contrary, that Nasworthy, on said settlement, was indebted to the estate the difference between \$6675, which Davis admits he received for him, and \$2311·36, for which difference Davis has never accounted.

In May, 1825, Davis admitted claims and assets in his hands, to the amount of \$28,681·57, deducting \$6674·73, due from Nasworthy Hunter for property which the heirs agreed to take back, but which it seems Nasworthy Hunter afterwards paid Davis.

What became of all these assets ? Davis has never reported them desperate or doubtful ; on the contrary, he admits in his bill he expected to collect them. But he has only in his last account accounted for \$12,828·52, and he only has charged the estate with debts, expenses, and all other charges, to the amount of \$16,232, to which, if the debt claimed to be due Nasworthy Hunter were added, it would be less than \$19,000, leaving a balance of more than

Davis v. Yerby.

\$10,000 in the hands of Davis, unaccounted for, beyond all debts due from the estate, up to the 30th of June, 1830, after an administration of 7 years. No final account has as yet ever been rendered by Davis, and, admitting the accounts he has already settled to be correct, which is disputed, upon a final settlement, he must show an amount of more than \$10,000 in his hands due to the heirs upon his own showing, and upon the face of the record, filed as an exhibit by Mrs. Yerby.

It is plain, then, that if Yerby has been guilty of maladministration, and could be held to account in chancery for maladministration, he is not accountable to Davis, but solely to the heirs and distributees.

3rd. But there is no maladministration, embezzlement, default, or waste, on the part of Yerby, in not paying the debts, or in taking insufficient security. Yerby was removed before he had the means to pay a debt, and everything was delivered into the hands of Davis, administrator *de bonis non*. The inventory, returned by Davis, shows he had received all the assets of the estate; all that Yerby could be called upon for, would be the amount of his purchase at the sale of the estate. For that he is entitled, as an offset to his commissions, which would be more than the amount. This can furnish no ground to come into chancery, even by a person having a right to call him to account. If any one has a claim against him for this sum, it is the present administrator *de bonis non*, Thomas Hunter.

Boyd, on the same side.

CHANCELLOR. The complainant seeks by his bill to set up two claims, which he desires to enforce against the defendant; one in his private capacity, as a creditor of the estate of Henry Hunter, for money paid by him as administrator *de bonis non* of that estate, over and above the assets of the estate that came into his hands as such administrator; he having discharged more of the debts of that estate than there were assets in his hands to be administered. The other claim which he seeks to establish, is, in his character of administrator of the estate of Nasworthy Hunter, to whose estate he alleges the estate of Henry Hunter is now indebted.

Davis v. Yerby.

The bill states, that Thomas Hunter is the present administrator of Henry Hunter, deceased, but does not make him a party to the cause.

The defendant, as executrix of her deceased husband, denies all the allegations of the complainant's bill ; asserts that her testator fully discharged his duties as administrator of Henry Hunter ; and, while she insists upon the judgment in the suit at law brought by the administrator of Henry Hunter against her, in bar of the claims here attempted to be set up, she also relies upon her demurrer to the bill, which she has made part of her answer.

Neither party has taken any proof : I am, therefore, compelled to decide the cause from the facts, as they are developed by the pleadings.

It is clear, that Davis has no right to call for an account or a settlement from the defendant, except for the purpose and to the extent of making available the two claims which he holds, one in his own right, and the other as administrator of Nasworthy Hunter. But can he do this ? can he press either of these claims to a settlement, without making the present administrator of Henry Hunter a party ? What is he seeking to do ? It is, so far as his claim against the estate of Henry Hunter is concerned, to coerce out of the defendant a debt due to him by that estate ; and he is endeavoring to do so, without making the representative of that estate a party to the suit ; and this, too, without there being any allegation of the insolvency of that estate, or that it has been finally settled. This is contrary to the rule upon that subject. The present administrator of Henry Hunter should have been made a party.

If, however, this were the only objection to the complainant's bill, it would not be dismissed, but would be directed to stand over for proper parties.

Passing by, then, this objection, I proceed to examine the case on its merits. The bill charges, that while the defendant's testator administered the estate of Henry Hunter, he was guilty of gross neglect and mismanagement of that estate, whereby large sums of money were completely lost to it : that he sold property of the estate, and took insufficient security for the purchase-money, by means of which the debts were rendered worthless, and a loss to the estate.

Davis v. Yerby.

I can have no doubt, that if an administrator acts in bad faith in taking security which proved insufficient, he would be held liable : his liability, however, would extend no further. So, if he were guilty of any gross negligence or wilful default in collecting claims, by which they were lost, he would be chargeable, but not otherwise. The bill, in this case, while it is full of general charges of maladministration of the estate, makes no specific and definite charges on the subject. There is the general charge, of wasting and embezzling ; but this is insufficient. In 1 Molloy, 469, the question of charging an executor with default or negligence, is critically examined by the Irish Chancellor, who states the result in this general rule, that, in order to ground a direction to charge an executor for default, not only must the fact be put in issue, but some case made by evidence to show the fact is probable, and the inquiry proper ; and that inquiry must be pointed to specifications. Let us apply this rule to the case before us.

1. Is the fact of default or negligence sufficiently put in issue ? It is true, the bill states he sold property to Joseph Hunter, and took his note, with Thomas Dawson as his surety, who was both insolvent and insane ; and that he sold, also, property to William Hunter, with Thomas Dogherty as his surety, who was insolvent ; but it is nowhere alleged, that Yerby took these sureties knowing them to be insolvent. He may have acted in good faith, for anything that is charged in the bill on these points, which cannot be aided by the general charges of waste and negligence : but,

2. Is there any evidence to show the fact is probable, and the inquiry or reference proper ? There is no testimony taken in the case, and the answer is a full denial of all the allegations of the bill.

There is another point worthy of consideration. It is not charged in the bill, that any of the assets of the estate of Hunter came to the hands of Mrs. Yerby, as administratrix of her husband, but it simply seeks to charge Yerby's estate with liabilities alleged, generally, to have arisen from the negligence of Yerby as administrator of Hunter ; and yet the bill calls upon Yerby's executrix for an account of effects received of Hunter's estate. In 3 Littell, 96, this point was presented for decision ; and it was held, that an administrator of an administrator could not be called on to account for

Davis v. Yerby.

the estate of the first's intestate, without proof that the estate in fact came to his hands. But in this case, there is neither allegation or proof on that subject.

If, however, these grounds did not preclude the complainant from calling for an account, there is yet another, which is fatal to the attempt set up in the bill.

Yerby, it is stated, was removed from the administration of Henry Hunter's estate in August, 1823 ; the bill was not filed until July, 1835, being a lapse of nearly twelve years. The answer states, that Yerby fully accounted, as far as he proceeded in the administration, and that the assets remaining unadministered were delivered over to the present complainant. Under such circumstances, it has been held by the Chancellor of New York, in 3 J. Ch. Rep. 578, that an executor would not be decreed to account. After so long an interval, great difficulty would, of necessity, arise, in proving who were solvent or insolvent. Evidence once in existence, might, in the lapse of so long a period, be lost, removed, or the witnesses have died. It is, therefore, with great propriety, adjudged, that where the executor, when attempted, after so many years have passed since he ceased to act in his representative character, to be held responsible for his acts in that character, answers that he has fully administered, he will not be decreed to account.

The complainant's bill must be dismissed, at his costs.

Tooley v. Kane, et al.

DECEMBER TERM, 1842.

HENRY TOOLEY, JR. v. JAMES K. KANE, et al.

The jurisdiction of the circuit courts, in the foreclosure of mortgages, is concurrent and coextensive with that of the superior court of chancery.

T. obtained a decree in the circuit court of Adams county, foreclosing a mortgage against G., upon a lot of ground; the lot was sold by a commissioner, to K., who gave bond; which was forfeited, and execution issued against K., and the mortgaged lot sold to M., who bought for K., but the money for which the lot sold, was appropriated to an older execution against K.; M. sold the lot to L., but the sale was fraudulent, K. still retaining possession; in this state of fact, T. exhibited his bill in this Court, to have the various sales of the lot set aside, and his decree of foreclosure enforced; held, that the circuit court was adequate to give relief, and this Court could render no aid to the complainant.

If it should become necessary to file an original bill, to enforce a decree for the foreclosure of a mortgage, rendered by the circuit court, that court would have jurisdiction to entertain such a bill, as an incident to its power to decree the foreclosure.

A sale of mortgaged premises, by a commissioner, is a sale by the court, and is not complete, or title passed thereby, until a report thereof is made to the court, and that report confirmed.

In case of any error in the proceedings in a commissioner's sale, the court will, even after confirmation of the report, set aside the confirmation, and rectify the evil: and if necessary, upon petition, order a resale.

THE facts of this case will be found substantially detailed in the Chancellor's opinion.

The bill was demurred to, and the case was submitted upon the demurrer.

Montgomery and Boyd, for the demurrer, contended:

1. That Izod, Little, and Mackin were improperly joined as defendants, they having no interest in the matters set up in the bill.
2. That the matters in controversy grew out of a proceeding on the chancery side of the circuit court of Adams county, and properly constitute a part of that suit, and that if the complainant was entitled to any relief whatever, it could be obtained in the court in which the principal matter was still pending.
3. That it appeared in the bill, that the injury, from which the complainant sought relief, arose from the irregular execution of a decree by a commissioner, which the circuit court of Adams

county, that rendered the decree, was fully competent, and was the only proper tribunal, to correct.

4. That the circumstances charged as fraudulent, on the part of the defendants, did not amount to fraud. That, although the court below refused to apply the money made under the sale by the sheriff to the master, the sale was valid as to the plaintiff in the execution, even though the execution was informal, and liable to be set aside ; and that it was no fraud in the sheriff, or purchaser, or any other person, to withhold the purchase-money from the complainant, after the court had refused and overruled his motion to have it appropriated to his debt.

Winchester, for complainant.

The object of the bill is, that the deeds to Kane, M'Masters, and Lacoste, for the land mortgaged, may be decreed to be fraudulent, and to be surrendered to be vacated, so that the land may be resold, to pay the decree upon the mortgage.

Some of defendant's objections go to the merits of the bill, and some to the jurisdiction of this Court.

It is said, we can take out execution on the original decree and sell the mortgaged land, because the lien still remains, notwithstanding these deeds ; also, that we can take out execution against Kane, Mackin, and Little, on the bond, and sell the mortgaged property, or property of Mackin and Little ; also, that the complainant might have set aside the proceedings in the court below, upon motion or petition.

These objections all go to the merits of the bill, and if they prove anything, prove that this bill would be dismissed on demurrer, whether filed in the circuit court, or their court.

The answer to all these objections is, that, admitting them all to be true, it does not show that we have not also this additional remedy. Suppose we sold under the original decree, or under the bond, the land mortgaged, we sell land to which there are titles in Kane, Mackin, and Little, and the purchaser might contest their titles on the same ground we seek to contest them now, upon the ground of fraud. Chancery has jurisdiction to try the fraud of these titles, and decree them to be vacated, and its jurisdiction is more complete

Tooley v. Kane, et al.

than the court of law upon ejectment, which could not order the titles to be cancelled, and do not try the question of fraud directly, but only collaterally.

The proper question, therefore, is, has this Court jurisdiction to try the fraud and grant the relief, so that the land may be sold under an undoubted title.

The objections to the jurisdiction are, that the circuit court having had jurisdiction to foreclose the mortgage, and to enforce its decrees, that a bill for the discovery of fraud and to cancel titles in this case, is ancillary to the enforcing their execution of their decree, and therefore the jurisdiction properly attaches to the circuit court, and not to this.

We deny the premises, and we deny the conclusion.

The premises, because they prove too much. If true, it would apply equally to judgments at law, and bills would have to be filed in the common-law courts to detect fraudulent conveyances as against creditors, and compel them to surrender their titles, that the lands might be sold to satisfy the judgments at law. This would be merely ancillary to enforcing judgments at law.

We deny the conclusion, because, even if the circuit court has such jurisdiction, it does not deprive this Court of equal jurisdiction; and this is an original bill, in which plaintiffs have elected to commence in this Court, and this Court has first obtained jurisdiction.

As to an execution on the bond of Kane, Mackin, and Little, I believe a sale of any property under said bond would be void.

In Story, on Equity Pleadings, the principles of the bill to remove obstacles are shown —

1. When, in a cause in which an inferior court has jurisdiction, a question arises not within its jurisdiction, such court cannot proceed in the cause. 1 T. Rep. 556.

This is a familiar principle. The circuit court has no jurisdiction to set aside conveyances for fraud, to let in a complainant to the benefit of his decree against land conveyed or alienated fraudulently, as against creditors.

2. As to concurrent jurisdiction. "To remove a fraudulent deed out of the way, plaintiff had a right to resort to a court of equity, the two jurisdictions being concurrent, as to this matter."

Tooley v. Kane, et al.

A case of judgment at law. *Claiborne v. Gross, et al.*, 7 Leigh, 345; *Murray v. Morgan*, 3 Lit. 295.

CHANCELLOR. The complainant shows, in substance, by his bill, that he obtained a decree in the Circuit Court of Adams county, to foreclose a mortgage against Horace Gridley, upon a lot in the city of Natchez. The decree was placed in the hands of an officer, who sold the lot to the defendant, Kane, made him a deed therefor, and took from Kane a bond for the payment of the purchase-money, with the defendants, Little and Mackin, as sureties. The bond was returned, and payment not being made thereon at maturity, was forfeited, and thereupon, an execution of *fieri facias* issued against the obligors therein, according to the provisions of the statute upon that subject. This execution was levied upon the lot aforesaid, and other property of the defendant, Kane, which were afterwards sold, under a *venditioni exponas*; that the defendant, M'Master, became the ostensible purchaser of said lot; that Tooley moved, at the return term of the *vendi. expo.*, to have the money made thereon applied to the satisfaction of his debt, but this motion was overruled, and the money otherwise applied; that another execution was issued and levied on the property of the defendant, Mackin, which was advertised, and sold in part to complainant, who received, on that execution, for the property by him purchased, to the amount of \$1635; that this execution, on the motion of Mackin, was subsequently quashed, on the ground that there was no judgment to support it; that the commissioner, executing the decree, made no report of the manner of executing the same, nor was there any order confirming his proceedings in the premises. It is charged that Kane was not a *bond fide* purchaser of the mortgage lot; that he paid nothing for it; that the *fi. fa.* under which M'Master purchased was void, there being no judgment to sustain it; that M'Master was a clerk of Kane; that he paid no money for the lot, or, if he did, that it was the money of Kane; that Kane still retained the possession of the lot; and that M'Master made a fraudulent sale to the defendant, Lacoste. Complainant insists, that his mortgage still retains its lien upon the lot, and prays that the sale thereof to Kane, from Kane to M'Master, and from him to Lacoste, may be set

Tooley v. Kane, et al.

aside, and declared fraudulent, and that a resale thereof may be ordered, under the original decree; that all proceedings under that decree be set aside, and that the decree be regularly enforced, and for a *certiorari*, if necessary, to remove the case from the Circuit Court, and for general relief. To this bill the defendants have filed a joint demurrer.

The only point made by the demurrer, which I deem it necessary to notice, is that which questions the power of this Court over a case situated like that stated by the complainant's bill. The constitution of this State has conferred, through the legislature, upon the circuit courts, concurrent jurisdiction with this Court, for the foreclosure of mortgages, and their power in that particular must be regarded as coextensive with the powers of the Superior Court of Chancery. In giving this jurisdiction, it was doubtless the purpose of the constitution to afford a remedy that should be adequate to the attainment of the ends of justice, and to place at the command of these courts all the principles and rules of practice, which belong to a proceeding to foreclose a mortgage. Under decrees of foreclosure and sale, the Court designates some one as an officer, to execute the decree, by making sale of the mortgaged premises, whose acts in the case are to be reported, for the consideration of the Court.

The theory of sales of this character is, that the Court is itself the vendor, and the commissioner or master its mere agent in executing its will. The whole proceeding, from its incipient stage up to the final ratification of the reported sale, and the passing of the title to the vendee, and the money to the person entitled to it, is under the supervision and control of the Court. The Court will confirm or reject the reported sale, or suspend its completion, as the law and justice of the case may require. Even after the confirmation of a reported sale, if it appear that any fraud, error, or mistake has intervened, injuriously affecting the interest of the parties concerned, the Court will set aside the order of confirmation, and rectify the evil, or order a resale, upon petition, for that purpose. *Robertson v. Haun*, Freeman, Ch. R. 270.

In this case, there having been no formal report by the commissioner, and no act of the Court, recognizing and confirming his acts

in the premises, the whole case rests *in fieri*, before the Circuit Court ; and the sale under the mortgage, as well as the sale under the execution on the bond, were under the power and control of that court, subject, as we have seen, to be set aside or confirmed, according as the law or justice of the case required. But it was said, that supposing the sales to Kane and to M'Master to be under the control of the Circuit Court ; that the sale from M'Master to La-coste would still remain in the way of enforcing the decree ; and that the Circuit Court has no power to set aside that sale. To this it may be answered, that as the decree, foreclosing the mortgage, still remained, in legal contemplation, open and unexecuted, La-coste is to be regarded as a purchaser *pendente lite*, and consequently acquired no claim to hold the lot, against the decree, which is equally as binding and conclusive against him as against the mortgagor. 11 Ves. jun. 197 ; 2 Ves. and Beames, 200.

I do not, therefore, perceive the necessity of filing a bill to enforce the decree in this case ; but if such necessity existed, I cannot doubt, that the power would rightly belong to the Circuit Court ; it would not be assuming a new ground of jurisdiction, but exercising a power incidental to the jurisdiction over the original bill. It may be laid down as a general rule, that every court has the power to enforce its own orders, judgments, or decrees. I am, accordingly, of opinion, that the demurrer should be sustained, and the bill dismissed.

Miller v. Gaskins.

DECEMBER TERM, 1843.

MILLER v. GASKINS.

M. indorsed a note in favor of G., upon which the maker afterwards paid part, and renewed the balance by a new note, which M. also indorsed; suit was afterwards brought, and judgment obtained against M., when he exhibited his bill, stating that the note had been given for an illegal consideration, which he was not aware of until after judgment was given against him, and therefore he did not defend at law; *held*, that the excuse, for not making the defence at law, was insufficient, and equity could grant no relief.

G. sold B. and W. negroes, introduced into this State in violation of law; B. and W. executed a note in part payment, which M. indorsed; G. sued B. and W. at law, upon the note, and they set up the illegality of the consideration of the note, and were discharged. G., at the same time, sued M., the indorser, who, being ignorant of the consideration of the note, made no defence, and judgment was had against him. M. exhibited his bill, setting forth these facts, and praying for a perpetual injunction against the judgment at law; *held*, that M. was entitled to the relief asked, and that the injunction should be perpetually enjoined.

THE opinion of the Chancellor is referred to for the facts of the case.

CHANCELLOR. This case was submitted on a motion to dissolve the injunction for want of equity. In January, 1837, the complainant became the accommodation indorser of Bailey and Waide, on a note to the defendant, for the sum of seven thousand and forty dollars. A payment was afterwards made on the note, to the amount of two thousand three hundred and forty dollars, and a new note, with the same indorsers, given for the balance remaining due. This latter note was put in suit against the complainant in the Adams Circuit Court, and a judgment obtained thereon, at the May term, 1840, which he now seeks to enjoin, upon the ground: 1. That the consideration of the note was the sale of negro slaves, introduced into this State as merchandise, in violation of the provisions of the constitution on that subject. 2. That unlawful and usurious interest was added into said notes, as part of the principal sum. He alleges, that he had no knowledge of these grounds of defence, until after the rendition of the judgment against him. There can be no doubt, that the defendant might have availed him-

Miller v. Gaskins.

self of either or both these grounds, as matter of defence at law. In regard to the first, the case of *Green v. Robinson*, 5 How. Rep. 80, shows that it is a legal defence, and that, if the defendant neglects to make it at law, he cannot be relieved in equity. The second ground was equally a matter for defence at law; a court of chancery has no jurisdiction over a question of usury, except for the purpose of affording a discovery. 10 Pet. Rep. 497; 3 John. Ch. Rep. 355. The question then is: Does the complainant show a sufficient excuse for failing to make his defence at law? It is not sufficient, that the defendant did not know of the grounds of defence at the time of the trial; it must appear, that he could not have obtained such knowledge by the use of ordinary diligence. There is not the slightest reason shown by the bill, why the defendant could not, or did not, possess himself, before the trial at law, of the information which he says he has since obtained. It is quite clear, that the same sources of information were open to him, as well before, as since; and that the same measure of diligence, exercised before the trial, would have been as effective in advising him of his defence, as was that which he exerted afterwards. If, after having indorsed one note, and afterwards renewed it by indorsing another, he failed to learn what was the moving consideration, nothing could suggest itself more naturally, than that he should recur to the maker of the note for whose consideration he indorsed, and from whom full and accurate information could readily have been obtained. I am well satisfied, that the excuse for failing to defend at law, is wholly insufficient to authorize this Court to disturb the judgment; and, if this constituted the complainant's only claim to relief, I should dissolve the injunction. But the bill discloses other facts, upon which I think the injunction should be retained. It appears, that Gaskins, in a separate suit against the makers, upon the same note, to which the complainant was an accommodation indorser, recovered a judgment in 1839. The makers having relied upon the illegality of the consideration of the note, and being overruled in that defence, prosecuted an appeal to the Supreme Court, where, in April, 1842, the judgment was recovered, and a final judgment rendered in favor of the makers of said note, discharging them from all liability thereon. Here,

Miller v. Gaskins.

then, is the anomalous case of the makers of a note, who were the principal and real debtors, being discharged because of the illegality of the consideration of the note, while it is attempted, upon a rigid and technical rule of law, to hold the mere accommodation indorser of the same note liable for its payment. It is against the first principles of equity, as well as the very nature of the relations of principal and surety, to hold the latter liable after the former has been discharged ; hence, the universal rule, that whatever discharges the principal, discharges the surety also ; when the principal is released, there is no longer any obligation, legal or equitable, resting upon the surety. And the rule must be the same, whether such discharge takes place by agreement, or by operation of the law, brought into activity by the agency of the creditor. The right of a creditor to make the surety liable, depends upon his right to make the principal liable, and if his claim upon the latter has become extinguished, no matter by what means, he can have no claim, in the eye of a court of equity, against the former. The reason of this rule is found in the nature of the relation of a surety, and in his right to be substituted to all the securities, of whatever kind, held by the creditor from the principal debtor ; which substitution could not, of course, take place, where the principal debtor had been discharged from all liability. This case affords an apt illustration of the equity and propriety of the rule to which I have adverted. If the complainant is compelled to pay this judgment, when the principal debtor stands discharged, he can have no remedy whatever for reimbursement. He would be told, that he paid it in his own wrong. Under this view of the case, although the complainant has not shown such diligence as to bring himself strictly within the rules by which courts of equity are guided in granting relief against judgments at law ; yet, I think it would be a fraud in the defendant, and against good conscience, to enforce his judgment against the complainant, after the principal debtors have been discharged. In the case of the *Marine Ins. Co. v. Hodgson* (7 Cranch, 332), the Supreme Court say, that there may be cases, where a court of equity ought to relieve a person who might have, but failed to defend himself at law. The court say, that such cases rarely occur, and the equity of the

Miller v. Gaskins.

complainant must be free from doubt, and the judgment must be one of which it would be against conscience for the party who has obtained it to avail himself. I think, that the case before me is one of so peculiar a character, as to justly entitle it to a place under the rare exception, which, that court admits, may be made to the general rule. It is needless to say, that the complainant, as an accommodation indorser, stands in the light of a surety, entitled to all the rights and remedies of such. The motion to dissolve the injunction, for want of equity, must be overruled.

Gwin v. Harris.

DECEMBER TERM, 1842.

W. M. GWIN v. B. D. HARRIS.

Applications to set aside *pro confesso* are addressed to the discretion of the Court, upon the circumstances of each particular case; and will, as a general rule, be granted, if not productive of injurious delay, and the applicant has not been culpably negligent.

G. filed his bill against H., a non-resident, and, upon proof of publication of notice, took his bill for confessed; H. applied for leave to answer, stating that he knew of the tendency of the bill, but his counsel informed him no answer would be needed; as soon as he learned a *pro confesso* had been entered against him, he came to the State, to have it set aside; the cause was not in a state for final hearing, for want of further evidence, on the part of the complainant; held, that the *pro confesso* should be set aside, and the answer filed, upon the payment of all costs by the defendant.

AN application was made in this case, upon affidavits, to set aside a *pro confesso*, entered at a former day of the term against the defendant.

Hughes, for the motion.

W. Yerger, contra.

CHANCELLOR. This case was submitted upon an application to set aside a *pro confesso* taken at the last January term of this Court, and for leave to file an answer, which is now offered. The defendant is a non-resident, and the *pro confesso* was based upon the execution of an order of publication. The defendant shows, that he was advised of the existence of the bill enjoining his judgment at law, by his counsel, who stated to him that it was unnecessary to answer the bill, as the injunction would be dissolved for want of equity. That as soon as he learned that a *pro confesso* had been taken, he repaired to this State, for the purpose of defending the suit. The question is, whether, under these circumstances, the defendant is entitled to the favor he asks. It is a sound and salutary rule of practice, to hold parties to a suit to reasonable diligence in their preparation for trial, and to make them suffer the consequences of their neglect. But rules of this kind are intended for the furtherance of justice, and must not be so applied as to defeat the end of their institution. They must have a just and reasonable

Gwin v. Harris.

application, guided by a sound discretion, exercised upon the features of each particular case.

In the case of *Beckman v. Peck*, 3 John. Ch. Rep. 415, Chancellor Kent, on affidavits, set aside a decree which had been taken by default, and enrolled for several months, perpetuating an injunction, and allowed an answer to be filed. It is clear, in this case, that a final decree cannot be rendered for the complainant, without further evidence. The complainant does not positively deny notice to him as indorser, and his whole ground for relief rests upon the question, whether he was charged with notice or not. To let the defendant in to a defence, cannot, therefore, materially delay the progress of the case. These applications are addressed to the sound discretion of the Court ; and where it is apparent that no injurious delay can result to the opposite party, the purposes of justice seem to demand, that the party in default should be admitted to a hearing, before his rights are finally adjudged, unless he has precluded himself by a culpable neglect of his interests. I do not think that the defendant, in this case, is chargeable with such neglect. He appears to have been misled by the erroneous advice of his former counsel. Let the *pro confesso* be set aside, and the answer filed, upon payment of all costs up to this time.

Hines v. Baine, et al.

DECEMBER TERM, 1842.

JOHN H. HINES v. A. C. BAINE, *et al.*

Where covenants are mutual and dependent, and have been violated by one party thereto, and the other desires to absolve himself therefrom, he must offer to comply fully with his part of the contract, before he can do so.

H. bought land of P. and L., and gave his notes for the purchase-money, and took their bond for title; H. did not pay his notes when due, and P. and L. sold the land to B. and M., who had knowledge of the sale to H. H. filed his bill, offering to pay the notes, and demanding title; *held*, that H. was entitled to the land, upon payment of the notes, and that B. and M. held the legal title for the benefit of H.

P. and L. having sold land to H., and given bond for title, afterwards sold and conveyed it to B. and M., who had knowledge of the prior sale; H. filed his bill to obtain a title, and did not make P. a party thereto; *held*, that P. was not a necessary party to the bill, the legal title being in B. and M., as trustees for H.

THE bill, in this case, alleges, that at the sale of lots in the town of Grenada, at auction, by the proprietors, John Reed purchased lots No. 75 and 76, at the price of two hundred and five dollars, for which he executed notes, and delivered them to Uriah Tyson, the agent of the proprietors, and Tyson gave bond in due form for a title, on payment of the purchase-money: that Reed went into possession, and made valuable and durable improvements, and occupied the same till some time in the year 1835, when he sold the lots and improvements to William P. Bryant and Lewis H. Bryant, for sixteen hundred dollars, or thereabouts, and transferred to the said Bryants the title-bond for said lots: that said Bryants went into possession and occupied the same till about the 23d day of November, 1836, when they sold to complainant, the terms of which sale were contained in a title-bond, given by them to the complainant, and a copy of which is filed as an exhibit with the bill, the original of which the complainant states he will file "when so required;" that the complainant, on the day of the date of said title-bond, executed and delivered his notes for the purchase-money, and received and went into possession; that there was erected on the lots a large frame for a tavern-house, but not completed, and complainant placed the same in possession of an agent, but before complainant could move with his family into said building, which he had prepared to do at considerable expense, the said Bryants fraudulently delivered

Hines v. Baine, et al.

possession of said lots to Alexander C. Baine and George K. Morton, without his knowledge, approbation, or consent ; that at that time, Baine and Morton had succeeded Tyson, and become the agents of the proprietors of the town lots, with power to sell lots undisposed of, to make titles for those sold, and to collect the money due. After complainant's purchase, Reed paid to Baine and Morton, agents as aforesaid, the purchase-money, and demanded a title, but they refused to make it, and said they would make it to themselves, alleging complainant had forfeited his contract with said Bryants, and that they had purchased the said lots of said Bryants ; that said Morton, before his purchase of Bryants, rented one of the houses on said lots of complainant, at \$8 per month, and occupied the same under complainant ; that complainant demanded possession of defendants, which they refused to surrender ; that the defendants knew of complainant's purchase, when they purchased of Bryants ; that the price of lots greatly enhanced before complainant's first note fell due, which was known to defendants, Baine and Morton ; Bryants had never produced his notes or demanded payment thereof, but withheld and concealed the same ; complainant has always been willing to comply with his contract ; defendants have finished the house, and complainant is willing to allow them for improvements, judiciously made, deducting reasonable rents and damages. He then tenders the purchase-money, without producing it in Court, and prays for a specific execution, &c.

The following is a copy of the copy of the title-bond given by the Bryants :

" Know all men by these, &c. The condition of the above obligation is such, that the above bound W. P. and L. H. Bryant have this day sold unto John H. Hines two lots, or parcels of ground, known as lots Nos. 75 and 76, on the Tullahoma map, for the sum and consideration of \$3575.50, for which sum said Hines executed two notes of hand, one note of the sum of \$1785.25, payable on the first day of January, 1837, the other note, for the same amount, payable the first day of January, 1838. Now, if the said John H. Hines does well and truly pay the above-named notes, we bind ourselves, our heirs, and assigns, to the said John H. Hines, to make him a good and sufficient title to the above-named

532 SUPERIOR COURT OF CHANCERY.

Hines v. Baine, et al.

lots, and this to remain in full force and virtue, until said titles are made, then to be null and void. Given under our hands and seals, this, the 23d of November, 1836.

(Signed)

W. P. Bryant, (seal.)

L. H. Bryant, (seal.)"

The answer of Wm. P. Bryant exhibits a copy of a receipt of Uriah Tyson, agent, to John Reed, for two notes for \$102.50 each, for lots Nos. 75 and 76, one due 1st September, 1834, the other due 1st September, 1835, and assignment by Reed to the respondent, for the sum of \$1400, of said receipt January 5th, 1836, and a copy of the assignment of said receipt by the respondent to A. C. Baine, the 13th January, 1837. It denies that there were valuable or desirable improvements on said lot when he purchased of Reed, or when he sold it to Baine; said receipt was the only evidence of title, till A. Brown and G. K. Morton, two of three agents for said town site, made a title to A. C. Baine, to said lots, upon his assignment of said receipt. In the latter part of the year 1836, he found he would be greatly pressed for money early in the year 1837; and at a sale of lots in Grenada, in November, 1837, he and L. H. Bryant put up the said lots for sale at public auction, upon the terms that the purchaser would give good and satisfactory security for one half of the purchase-money the 1st January, 1837, the other half 1st January, 1838; that said Hines became the purchaser, but could not give satisfactory security to respondent, and L. H. Bryant (who was interested with respondent in said lot, without evidence of title); they then made a new contract with complainant, the terms of which are not explicitly stated in the copy filed by complainant, and which he believed his bond to comprehend.

The terms of the new contract (which had no connection with the sale at auction) were, that if the said Hines did not punctually pay the notes given for the same at maturity, the sale was to be void and of no effect; and, to secure the fulfilment of the stipulations of the trade, respondent reserved the payment till the first note should be paid, and did not deliver possession to complainant, as he has falsely charged in the bill of complaint, and possession has never been given to him. The answer stated, that it was false, that respondent concealed said notes given by said complainant, but the

Hines v. Baine, et al.

truth was, payment was demanded several times of said notes, and the last time, said complainant said he had bought said lots, had a title-bond for them, and would pay for them when he pleased. Having been disappointed in getting payment to answer his pressing demands, for which purpose he had sold the lots to complainant, he, on the 13th January, 1837, sold to A. C. Baine; denies all fraud, &c.

The answer of A. C. Baine and George K. Morton states, that the title to Baine was derived as stated in the answer of Wm. P. Bryant; that Alfred S. Brown and respondent, Morton, made the title to said lots to said Baine; denies that ever said Reed demanded the title; that respondent, Morton, by deed from said Baine, became joint-owner with him for said lots. A. C. Baine admits he knew of the sale from Bryant to Hines; but he had always understood that the contract was, that said Bryant refused to give possession to Hines till the payment of the first note, and that if the payment was not made, the contract was to be void, and as if it were never made; and that Bryant had repeatedly demanded payment of Hines, and that Hines had avowed the intention not to pay for said lots till he pleased; and of these facts, said Morton acknowledges he was cognizant, before he purchased of said Baine, and they were both cognizant of Hines's having bid off the lots at auction, and failing to give security, as stated in the answer of said Bryant. Respondent, Morton, acknowledges he did agree to rent a small house on said lot from complainant; it was when under the impression the complainant was the owner, and entitled to the possession of the same by purchase from Wm. P. Bryant, under whom the respondent was then, and had been previously occupying said house. Said Reed paid his purchase-money, not to respondents, but to one Benjamin Hinson, to whom his note had been passed. They deny that there were valuable or lasting improvements on said lots, when Baine purchased from Bryant, or Morton from Baine.

The following depositions were taken for the defendants.

Uriah Tyson proved, that he gave the security to Reed for the purchase of the lots; proved Morton's handwriting as witness to the assignment from Reed to William P. Bryant, and proved the assignment from W. P. Bryant to A. C. Baine.

Hines v. Baine, et al.

John Reed proved, that said receipt was his only evidence of title; proved his assignment to W. P. Bryant, and that Morton witnessed it; that he paid his note to a man named Hinson, gave him part in money, and an order on Morton for the balance, who paid it; that he never demanded a deed of Morton and Baine.

Thomas M. Jones testified, that he heard Hines was talking of finishing the building, and Bryant told Hines he considered the building his, till the first payment was made satisfactory; Hines said the first payment could be made, and he could make arrangements to do it. This was some time after the sale, the witness did not recollect when; Hines applied to him to take charge of the premises, but he did not recollect whether Bryant was present; the witness told Bryant, on the same day, what Hines had said; he replied, Hines had nothing to do with it.

L. H. Bryant, one of the defendants to the bill, was not served with process, and a motion was made to dismiss the suit for want of prosecution, under the rule which provides, that if two terms of the Court elapse without any attempt to bring a necessary party before the Court, the bill may on motion be dismissed. The case was at the same time, in case this motion should not prevail, submitted for final hearing and decree.

The bill was filed October 1, 1838.

Rucks and Yerger, for complainant.

The legal title is in Baine and Morton; they may be decreed to convey, or the legal title may be divested out of them; so they are the only necessary parties, so far as the title is concerned.

They set up to hold the lots, upon the ground, that complainant, Hines, promised to pay the first instalment to Bryant, on 1st Jan. 1837, and failed to pay it on that day, and that therefore Bryant could lawfully sell the lots, 13 days thereafter. Baine and Morton admit, that they knew of complainant's claim at the time they purchased from Bryant.

Bryant asserts this ground in his answer, as the excuse or reason why he sold to Baine, to wit: that complainant Hines was to pay him punctually, and failed to do so; and says, it ought to have been so written in the bond, but was not.

Hines v. Baine, et al.

This is a plain case. Bryant sold the lots ; gave a bond for title; and took promissory notes for the purchase-money : from that moment the lots in equity became the property of Hines, and Bryant was entitled to the purchase-money. There is no pretence in the answer, that the contract was not consummated. The bond to convey, and the notes to pay, were both executed and delivered ; Bryant had the notes ; demanded the money upon the first instalment when it fell due, and still holds the notes. It is not for him now to set up, that Hines should have given security. Jones, a witness, says, that by the terms of the sale, security was to have been given for the purchase-money. It does not appear whether security was given to the notes, or not ; but there is no pretence that it was demanded and refused, or that the trade was not consummated on that account, or on any other account.

Baine and Morton were trustees — determined to make an unjust use of their power for their own advantage ; they fraudulently, and by indirect means, took the title to themselves.

Morton had rented the premises from Hines, had gone into possession under him, and could not acquire, nor set up, an opposing title.

These principles are too plain, and of too frequent occurrence, to require authorities.

The Court will divest them of title, or decree them to convey to complainant.

Topp and Thompson, for defendants.

The motion in this case is, first, to dismiss the suit for the want of prosecution ; the bill was filed 1st October, 1838, subpoena issued and returned, executed on Morton, Baine, W. P. Bryant, and their answers filed January 7th, 1839 ; and no steps have since been taken by complainant against L. H. Bryant, one of the defendants ; and, for the failure to prosecute the suit against him, the motion is made to dismiss, but the defendants, who have answered, are desirous to waive that motion, and try the cause on the merits, if the Chancellor should believe that L. H. Bryant is not a necessary party ; and it is only in the event that the Chancellor should be of opinion, that L. H. Bryant is obliged to be before the Court, and

Hines v. Baine, et al.

that complainant cannot get on without having him before the Court, that the defendants who have answered, insist on their motion to dismiss, but are willing to waive this motion, and try the case on the merits, if it can now be done.

2d. On the merits, the complainant has not produced his bond for title ; Bryant, in answering as to the copy filed, says, he thought the original and contract of sale were different. The copy of the bond filed shows, that the money was to be paid before the title was to be made. The evidence of Tyson shows, that complainant had trifled, and did not mean to pay the money ; the first payment was to have been made 1st January, 1837 ; the bill was filed 1st October, 1838 ; the money had not then been tendered, nor is it tendered with the bill. The answer of Bryant says, that the true contract was, that he, Bryant, was to retain possession till the first payment should be made, and, if not punctually made, that the contract was to be void ; how then can the complainant get on with a copy of the bond, (withholding the original, which the vendor alleges is different from the copy filed ?)

As to the right of Bryant to sell, on the failure of complainant to comply on his part, see 1 John. Ch. Rep. 282, 373 - 375 ; 2 Wheat. 299 ; 1 Madd. Ch. 427, in which it is settled, that a party claiming specific performance, must show that there is no fault on his part.

Again, in all cases where on a contract for the sale of land, the payment of the purchase-money is a condition precedent to the conveyance, the vendee, after default of payment, is not entitled to specific performance, though he may have paid a part of the purchase-money. 1 Madd. Ch. 419, note ; 4 John. Ch. Rep. 559 ; 5 John. Ch. Rep. 193.

That the application for specific performance is to the discretion of the Chancellor, and must present a case different from the present to authorize a decree. See 6 John. Ch. Rep. 217, 225 ; 1 Desaus. 256 ; 14 John. Rep. 257 ; 6 John. Rep. Ch. 232 ; 2 Wheat. Rep. 299.

CHANCELLOR. This is a bill for the specific performance of a contract, for the sale of two lots of land in the town of Gresada.

Hines v. Baine, et al.

The complainant bought the lots of P., and L. H. Bryant, gave his notes for the payment of the purchase-money, and took their bond to make titles upon the payment thereof, which he now offers to do. The defendants, Baine and Morton, admit, they subsequently purchased the lots from Bryant, with notice of his previous sale to complainant, but say, that they were informed, that Hines had not complied with his contract. Bryant insists in his answer (although nothing of the kind appears in the bond) that, if the purchase-money was not paid punctually, the sale was to be void ; that it was not so paid, although demanded. There is no proof in reference to either of these facts, either as to the terms of the contract, or the demand of the purchase-money. The introduction of the bond for title is objected to, because it is but a copy from the record of its registration. This is expressly made evidence by the statute of 1837. How. and Hutch. 610. If the defendant intended (as intimated in his answer) to deny that it is a true copy, he should have applied for a rule to compel the production of the original. I think, that Bryant was not at liberty to elect to consider the contract as rescinded. Although a contract may be rescinded by one party by acts *in pais*, yet, where such is his intention, he must give notice of it, and must put the other party in default by offering to comply fully with his part of the contract. In this case, the covenants are mutual and dependent, and before Bryant could absolve himself from the contract, he was bound to have tendered a deed, or at least offered to convey upon the purchase-money being paid: *Hudson v. Smith*, 20 John. Rep. 27.

There is nothing in the case going to show that there was either an offer to convey title, or that there was a demand of payment of the purchase-money, or that the complainant had any notice of the intention of his vendor, to abandon or rescind the contract. It is not necessary, that L. H. Bryant should be a party. The legal title to the lots is in Baine and Morton, and they having received that title with notice of the complainant's prior equity, they became trustees thereof for his use, and will, upon well settled principles, be compelled to convey it to him. *Sims v. Richardson*, 2 Littell, 276. Let a decree be prepared, in accordance with these views, appointing a commissioner to convey the legal title, upon the com-

538 SUPERIOR COURT OF CHANCERY.

Hines v. Baine, et al.

plainant's filing with the clerk of this Court a receipt for the payment of the purchase-money, or depositing the same in Court, and directing the complainant's bill to stand dismissed, if he fails, within 90 days from the date of the decree, to comply with the terms thereof.

DECEMBER TERM, 1842.

JAMES PICKENS v. LOGAN HARPER, et al.

The rule, that a party must recover upon the strength of his own title, and not upon the weakness of his adversary's, holds equally in equity as at law.

Under the 14th article of the Dancing Rabbit Creek treaty, granting reservations of land to the head of each Choctaw family, and to each of his children, the treaty intended to secure to the head of the family only one section, and to each of the children the amounts stipulated by the treaty; *held*, therefore, that the bill of a Choctaw Indian, setting up title in himself, to the portion of land reserved for his children, must be dismissed.

THIS case was submitted upon bill and answers, for final decree.

CHANCELLOR. The complainant states, in substance, that at the time of the ratification of the Dancing Rabbit Creek treaty, made between the U. States and the Choctaw tribe of Indians, he was the head of a Choctaw family, having nine children, three over and six under the age of ten years; and that he was, by the terms of the 14th article of said treaty, entitled to four contiguous sections of land, out of the territory which formed the subject of said treaty; to wit, one section for himself, a half section for each child over ten years, and a quarter section for each one under that age; that, at the time of the treaty, he was residing on section 6, town. 11, range 8, east, and that he applied to have that section, as also section 7 of the same township, and sections 1 and 12 of township 11, range 7, east, reserved from public sale; that he fully complied with all the requirements of said 14th article of the treaty, necessary to perfect his title to said sections of land; that the defendants have since acquired, from the government, the legal title to different portions of section 12, of which he prays they may be divested, and his title declared valid.

The answers admit the material allegations of the bill, and simply refer to the Court the general question, whether the complainant is entitled to recover, without presenting or urging any particular ground of defence. This devolves upon me the necessity of look-

ing, generally, into the nature of the complainant's claim; for the rule, that a party must recover upon the strength of his own title, and not upon the weakness of his adversary's, holds equally in equity as at law.

It will be seen that the bill proceeds upon the assumption, that the complainant, as the head of a Choctaw family, is not only entitled, in his own right, to the section reserved expressly to him, but also to the reservations in favor of each of his children. This, I conceive, is a misapprehension of the spirit, meaning, and intention of the treaty. The treaty, after declaring that each Choctaw head of a family shall, upon certain conditions, be entitled to a section of land, proceeds thus:—"in like manner shall be entitled to half that quantity for each unmarried child, which is living with him, over ten years of age; and a quarter section to such child as may be under ten years of age, to adjoin the location of the parent."

Although this language is somewhat obscure and inartificial, it is clear beyond doubt, that it was the purpose of the treaty to make substantive and distinct provisions for the children, independent of the father, although their title must be considered as following the conditions annexed to that of the father. The doubt with me is, whether the language referred to vests the technical, legal title in the father, to the portion reserved for the children, to be held for their use, or whether they take directly a clear, unincumbered fee to their portions, independent of the father. I am not advised what construction, in practice, the government of the United States has placed upon this article, in emanating titles under its provisions:—whether the grant is to the father, for the use of the children, or directly to the children themselves. It is true, that no practical exposition of that kind could change any rights which exist by virtue of the treaty; it would, however, show the construction given by one of the parties to it, which I should be inclined to adopt. In the construction of a grant, it is the duty of the Court to give effect, if possible, to the intention of the parties. This intention is to be collected from the words and expressions of the grant itself; and where there is doubt or obscurity, the construction will be most strong against the grantor, and in favor of the grantees; and to that end, the Court will fill up an ellipsis, and transfer clauses and sen-

Pickens v. Harper, et al.

tences, so as to make it available: *Lloyd v. Say, et al.*, 1 Salk. 341; *Reesdale v. Halfpenny*, 2 P. Wms. 151; *Darrell v. Gunner*, Wm. Jones, 206; *Hammond v. Ridgley*, 5 Har. and Johns. Rep. 345; *Howard v. Rogers*, 4 id. 278.

I cannot conceive, that there is the slightest pretext for saying, that the father is exclusively entitled, as well to the reservation in his favor, as to that in favor of his children. This would violate every known rule of construction, and thwart the plain intention of the treaty. If it was intended, that the extent of the reservation, in favor of the father, should be measured by the number of his children, we should expect to find either a regular and proportional increase, or a gross number of acres reserved to him, according to the number of his children; but we find a distinct reservation for the father, and then a separate but unequal provision for each child. I think, by filling up an ellipsis, and making a slight transposition, the plain reading of the article is, that there shall be reserved to each head of a Choctaw family one section of land; and, in like manner, there shall be reserved half that quantity for each child living with him, over the age of ten years; and a quarter section to each child under that age. In the case of *Newman v. Harris and Plummer* (5 How. Rep. 564), where this provision of the treaty was under discussion, the Court strongly intimate an opinion against the right of the father, beyond a single section. Referring to a charge given by the court below, Mr. Chief Justice Sharkey says: "If by this charge the Court intended to convey the idea, that the title to the whole 1280 acres vested in Foster individually, and no portion of it to his children, or to him in trust for them, the propriety of the charge may be doubted."

If the construction which I place upon the language of the treaty be correct, it will follow, that the father is neither vested beneficially, nor in trust, to any portion of the land reserved on account of the children. Although there is something, from the awkward structure of the sentence, which gives color to the idea, that the father is to take in trust for the children, yet the spirit and scope of the whole article on that subject is, I think, opposed to such construction. I can see no solid reason in its favor. The treaty itself indicates no special or general purpose in favor of separating

Pickens v. Harper, et al.

the legal from the equitable title, as to the reservation in favor of the children ; and as it expresses none, I feel bound to presume, that none such existed, and that it was not the intention to create such a distinction.

The complainant shows, that section six is the one to which he is individually entitled under the treaty, by reason of his residence thereon ; and as he shows no title to section twelve, which is here in controversy, his bill must, according to the view I have taken of it, be dismissed. But as the defendants have allowed him to progress to a hearing on the merits, without taking the objection upon which the case turns, each party will be directed to pay his own costs.

Let a decree be prepared accordingly.

Davis, et al. v. Roberts.

DECEMBER TERM, 1843.

JANE DAVIS, et al. v. ELDRED G. ROBERTS, ADMINISTRATOR
OF MATILDA VAUGHAN.

After general answer, the defendant cannot raise the question of jurisdiction on the hearing, unless the defect of jurisdiction goes to the very subject-matter of the suit.

An interlocutory decree for an account, is always under the control of the Court, and may, under peculiar views, even after confirmation of the report by a commissioner, taking an account under the decree, be reviewed and set aside.

D. filed her bill, claiming a large sum to be due from R.'s intestate, V. (for whom D. had once been guardian), for sums expended for V., while she was her ward. — An interlocutory decree for an account, though the bill did not pray for an account, was ordered, and the commissioner reported a large balance to be due D., for the care of V., not only while the relation of guardian and ward existed, but for a period long anterior to that time ; which report, although excepted to by both parties, was confirmed, without disposing of the exceptions ; *held*, upon final hearing of the cause, that the report of the commissioner was not *res adjudicata*, by the order of confirmation, but was under the control of the Court, and should be set aside and annulled, for irregularity.

D., in the year 1815, offered to take charge of V., a motherless infant, and raise and educate her at her own expense, and did so, until the year 1830, when she took out letters of guardianship over V., and her property, and in her report, as guardian, to the Probate Court, in 1832, stated that she had kept no account against V., and, from friendship for her mother, had been induced to raise and educate V. ; *held*, that under these circumstances, there was no foundation either in law or fact, for any charge in favor of D. against V., prior to the year 1830.

Where a guardian expends more money upon his ward, than the income of his ward's estate, without authority from the proper tribunal, he does it at his peril ; and, having so done, he has no claim to have the principal property sold to reimburse him in such excess, much less a right to retain the property for that purpose.

Where exceptions are allowed to a report, reducing the amount of the account reported, the Court can, without referring the account back for a restatement, modify the report, and settle the true amount upon the evidence reported.

THE bill in this case states, that Jane Davis was appointed guardian of Matilda Vaughan, an orphan, and came into possession of eight slaves, the property of said Matilda, to wit : Laura, aged 24, and her two children, both under the age of 4 years ; Fanny, aged 40, and her 4 children ; Alran, aged 18 or 20, Sandy, 10, Martha, 6, and Henry, 4 years.

That, from the 1st of April, 1815, to 16th March, 1834, said Jane expended large sums of money, for maintenance and educa-

Davis, et al. v. Roberts.

tion of said Matilda, who died, about the 16th March, 1834, and Eldred Roberts became her administrator.

That since the death of Matilda, four of said slaves have been hired by said Jane to the complainant, Stamps, to wit: Matilda and her four children, and three have been hired to the complainant, Ananias Darbin, to wit: Laura, and her two children.

That Roberts has commenced an action of detinue against Stamps, and another action against Darbin, for said slaves.

That upwards of \$3000 is due to Jane Davis, after deducting the amount received by her for hire of said slaves, and said slaves are the only security in her hands, out of which to return the advances of money, and expenses, for the maintenance and education of said Matilda, prays an injunction of the suits at law, and that said slaves may be sold to satisfy the amount due to said Jane, and the residue, if any, paid to the administrator, and for general relief, of the defendant.

The answer admits, that Jane Davis, in 1830, was appointed guardian, but avers she never gave bond according to the order of the court appointing her.

That some time in January, 1830, said Jane came into possession of the slaves of said Matilda, as is stated in said bill.

That said Matilda died in 1834, and defendant became her administrator.

That, about the year 1815, Jane Davis, for the friendship she had for Matilda's mother, besought the friends and relations of said Matilda, to suffer her to keep said Matilda, promising to raise and educate her at her own expense.

That several of the relatives and friends offered to take Matilda, then about one or two years old, and raise and educate her at their own expense, but said Jane insisted on keeping her, and raising her at her own expense, and never thought or pretended she was entitled to charge anything for raising said Matilda, until 1830, when she became her guardian, and received possession of said property.

The answer charges, that the hire of said slaves was more than sufficient to pay for Matilda's education and maintenance, up to the time of her death, without touching the capital, and insists said Jane shall not be allowed more than the income of said property.

Davis, et al. v. Roberts.

That said Jane, so far from paying the debts of said Matilda, suffered, to a large sum, the debts to remain unpaid, which defendant, as administrator, has paid.

That defendant called upon her to deliver to him said slaves, to enable him to pay the debts, and obtained an order upon her, to deliver them, from the Probate Court, which she refused to obey. That defendant, therefore, commenced suit for the recovery.

The answer further says, that the charges made in the bill, for her maintenance and education, are unfair and unjust, illegal and false ; and of which no part, up to 1830, ought to be allowed, and, since 1830, the hire of the slaves was more than sufficient to compensate.

That if properly hired, the hire would have amounted to \$1436, which would more than pay the expense of her maintenance and education.

That since the death of Matilda, the hire of the slaves has been worth \$400 per year.

That upon a fair and legal settlement of accounts, between said Jane and the estate of said Matilda, a considerable balance will be due the estate of said Matilda.

That no part of said Jane's account ought to be allowed, as no vouchers are shown, and the accounts may still come against the estate, as some accounts have already come ; and prays that the injunction be dissolved, and that Mrs. Davis may be compelled to pay the defendant that portion of the hire for the slaves which she has received, over and above the amount of expenditure she had been at, on account of her ward, &c.

Upon this state of pleading, the then Chancellor ordered an interlocutory decree for an account ; the decree purports to have been made by consent of parties, and directs : " That the case be referred to John B. Jones, to take and state the account between the parties, of and concerning the charges and demands of complainant, Davis, by board and expenditures by her furnished and incurred, on behalf defendant's intestate ; and also, for charges and demands of defendant, against said complainant, Davis, for the use, hire, and profits of the slaves of defendant's intestate, in

Davis, et al. v. Roberts.

the possession of said complainant, and for money received by complainant to said intestate's use.

"On taking the account, said commissioner is instructed to receive all proper vouchers, or evidences of debt, in behalf of either party, subject to such exceptions to their allowance, as either party may file before him. He will hear and receive all competent testimony in the cause, and report the same as taken, in writing, to this Court.

"It is further ordered, on taking said account, said commissioner is instructed to distinguish, in his report, such items and charges of complainant, Davis, against defendant's intestate, of date prior to her appointment as guardian to defendant's intestate, from those made subsequent.

"It is further ordered, that the question of final allowance to complainant, of demands and charges against defendant's intestate, accruing before such appointment of guardianship, be reserved for the decree of the Chancellor, on the coming in of said report.

"To give legal notice, &c., and report to the next term."

The cause was duly referred, and the report made in due time. It is not deemed necessary, to set out the particulars of this report at greater length than is done in the Chancellor's opinion. It was excepted to by counsel of both parties, but notwithstanding the exceptions, and without any disposition of them, was confirmed.

The report exhibited a large balance in favor of Mrs. Davis, and extended over the whole period from 1815, until the death of Miss Vaughan.

Upon this state of fact and pleading, the cause was submitted for final hearing and decree.

Winchester, for the complainant.

The confirmation of the report was a waiver of the exceptions, and precludes any inquiry behind the report.

Probate Court had no jurisdiction with reference to the account accruing before the relation of guardian and ward commenced, and, there being a general answer, the question of jurisdiction thus far is waived. 4 J. Ch. R. 445.

Objections to the admissibility of evidence before a Master, not

Davis, et al. v. Roberts.

made the ground of exception on the coming in of the report, will be considered as waived, and cannot be made at the final hearing. *Maurice v. Cox*, 5 John. Ch. Rep. 441; *Smith v. Smith*, 4 vol. John. Ch. Rep. 445.

On the final hearing, the Court cannot hear objections to the interlocutory decree to account, or to the confirmation of the report, both of which are *res adjudicata*.

The interlocutory decree was drawn up by defendant's counsel, and is in his handwriting, Mr. *Henderson's*, and is by consent of parties.

It directs, that the consideration of what items should be allowed, anterior to the appointment as guardian of the complainant, should be reserved to the coming in of the report. On the coming in of the report, the exceptions accompanied them, and the items were allowed by the confirmation of the report, and are not now open for discussion.

Quatman and M'Murran, for defendant.

It appears that the report of the commissioner has been confirmed, notwithstanding exceptions were filed, without any notice of the exceptions.

Without dwelling upon this error, we propose to look into the merits of the cause. The confirmation of the report, made upon an interlocutory order by consent, amounts to nothing more than a recognition of the correctness of the amounts of claims reported under each head.

The interlocutory order is not a decree to account. It contains no order or decree to account. It is a mere reference, by consent, to ascertain amounts as facts. If it can be considered as an order to account in relation to receipts and expenditures, as guardian, it certainly and clearly leaves the question of the liability of the defendant, for the items prior to 1830, the open subject of consideration to the final decree.

The confirmation makes no order in relation to that branch of the report. The disposition of that claim can only be made on final hearing. Neither party could except, under the terms of the interlocutory consent order, that the commissioner reported certain

Davis, et al. v. Roberts.

claims, because it was agreed he should report them. Therefore, the confirmation merely recognizes the propriety of the report, so far as it follows the reference.

This consent reference can only be considered as a convenient mode of finding facts, to be used on final hearing.

If this be considered a correct view of this order, admitting the consent to account, while the relation of guardian and ward really existed, I insist upon the statute of limitations against the old account claimed.

2. The evidence shows it never was intended to be claimed. It was never claimed by the guardian, by the exhibition of any account. 2 M'Cord, Ch. R. 56; 1 Munf. 119.

3. All claim, if any existed, and all controversy about it, is settled by the report to the Orphans' Court, and by the final order, directing the property to be delivered up. This must be regarded, in connection with the report, as a final and conclusive settlement of all claims between the guardian and ward. And if the consent to refer the accounts since 1830, may be considered as enabling this Court to take jurisdiction of those matters, no such consent, to allow claims prior to 1830, can be drawn from the reference, and we make all objections to them.

4. A guardian, who has had possession of a ward's property, and has never rendered any account of that property to the proper tribunal, cannot be allowed for expenses.

The above remarks are made on the supposition that the Court can take cognizance of the order of reference, on account of the partial consent of the defendant. We think, however, the Court has no jurisdiction to compel or settle such account between guardian and ward, and that the partial records presented show that the competent tribunal has already acted upon these accounts, and given a final decree thereon, by the order to deliver up all the property of the ward. If such should be the view taken, what should be the decree?

The complainant has come into this Court, and herself shown, and the proofs show, that she has received the hire of these slaves from the termination of her guardianship, by the death of the ward.

Davis, et al. v. Roberts.

We should receive a decree for that sum, as ascertained, and the injunction should be dissolved.

CHANCELLOR. It is necessary, to a correct understanding of this case, that I should advert to its leading facts, and to the peculiar attitude in which it is submitted for final hearing ; as much of the embarrassment in its consideration arises from technical difficulties, which have grown up in its preparatory stages.

The substantial facts of the case, as disclosed by the pleadings and proof, are these :—The complainant (Jane Davis) in April, 1815, solicited and obtained the care and custody of the person of Matilda Vaughan, then a motherless infant, and continued that custody, as a kind of foster-mother, up to January, 1830, when she applied for and obtained an order for letters of guardianship to said minor, from the Probate Court of Wilkinson county, and thereupon took possession of eight negro slaves, belonging to her said ward ; and, in 1832, returned to said court an account of their hire, which appears to be the only account of the kind exhibited by her during the continuance of her guardianship. In March, 1834, Miss Vaughan died, and the defendant administered upon her estate, and obtained an order from said court, requiring Mrs. Davis to deliver over to him all the property in her hands, as guardian aforesaid. This order was disregarded, and the administrator brought his action of detinue, to recover the possession of said slaves; whereupon, the complainants filed their bill in this Court, enjoining said action, and in which Mrs. Davis claims a large balance as due her, in her character of guardian, dating her account back with the commencement of her care and custody of the person of Miss Vaughan, and asking a decree for the sale of said slaves, to satisfy such balance. No account is asked for, but a specific balance is stated, in the shape of a fixed and ascertained debt. The answer of the administrator admits that Mrs. Davis took charge of his intestate (Miss Vaughan) in the year 1815, but states that it was done at her earnest solicitation, and with the promise that she would raise and educate her, at her own expense, and insists that no charge can be made from 1815 up to 1830, when she became guardian ; and that, from that time to the death of Miss Vaughan, the use and hire of the slaves was more than

Davis, et al. v. Roberts.

sufficient to meet the expenses for board and education, and asks a decree against Mrs. Davis for the overplus.

In July, 1836, an interlocutory order for an account was made by Chancellor Turner, with the consent of the parties, in which the commissioner is instructed to state an account of the charges for board and education, and of the charges for the hire of the slaves, and to distinguish between such charges for board, &c. as accrued before the complainant's appointment as guardian, and those which accrued afterwards. The commissioner made his report accordingly, showing a large balance due the complainant, accompanied by exceptions taken by both parties. By some oversight, as I presume, this report was subsequently confirmed, without any notice having been taken of the exceptions; and in this awkward and embarrassed condition, the case was submitted, at a former day, on final hearing. The counsel for the defendant insists, that the case should be dismissed, for want of jurisdiction; that the settlement of the account of the complainant properly belongs to the Probate Court in which the letters of guardianship were taken. If this objection had been taken by demurrer or plea, or had been insisted on in the answer, I should have held, in accordance with the course of decision in this State, that the bill should be dismissed; but the objection is not taken in either of these forms. It has been repeatedly decided, in this Court and elsewhere, that a defendant cannot, after general answer, raise the question of jurisdiction on the hearing, unless the defect of jurisdiction goes to the very subject-matter of the suit. The true contest is, whether the complainant is entitled to any portion of the account, reported as accruing prior to the date of her letters of guardianship. The complainant's counsel insist, that that question cannot now be looked into; that it became *res adjudicata*, by virtue of the interlocutory decree, and the confirmation of the report made under that decree; neither of which, it is insisted, can be reviewed upon the final hearing. I cannot assent to these propositions, to the extent to which they go. Suppose (as will appear to be the case here), that an interlocutory order should be made, directing an inquiry into matters for which there was no foundation laid by the bill, must the Court necessarily decree upon those matters, because of such order, and a confirmation of the report thereon? I think not. A general

Davis, et al. v. Roberts.

reference for an account is a mere decretal order, and has not the conclusive incidents of a decree. It is intended to ascertain mere matters of fact, pertinent to the case, and preparatory to a final hearing. 1 Hoffman, Ch. Pr. 501. And if, under such reference, the commissioner reports anything not warranted by the bill, the Court would, I conceive, be bound to disregard it upon final hearing; and that, too, whether exceptions were taken or not, and even though the report had been confirmed; for the reason that the Court, in rendering a decree, cannot travel out of the boundary prescribed by the pleadings and proof. Such a report would be analogous, in its effects and consequences, to the finding of a jury, under an immaterial issue. I find express authorities (if indeed authorities were necessary on such a point), which warrant me in declaring that an interlocutory order, made in the progress of a case, is always under the control of the court rendering it, and that it is not error to set it aside. *Hays v. May's heirs*, 1 J. J. Marsh. 497. Such order may be set aside for irregularity or other cause, showing that it should not be allowed to stand. 2 Mylne and Keene, 284; 4 Johns. Ch. R. 35.

There are many cases where the report of a commissioner has, under peculiar circumstances, been reviewed, even after confirmation. *Adams v. Claxton*, 6 Ves. 226; *Turner v. Turner*, 1 Jacob & Walker, 39; 1 Hoffman's Ch. Pr. 549. I think the case before me presents the strongest ground for the exercise of that power. In the first place, it was certainly irregular to take a confirmation of the report, while exceptions were pending from both parties. In the next place, it appears from the complainant's bill, that she claims alone in her character of guardian, without stating at what time she became such guardian. There is no claim, whatever, set up by the bill, except such as accrued to her in right of her guardianship. It is clear, therefore, that she cannot, by the form of any interlocutory order, nor by any proof, make her case broader than it is made by her bill. Now the proof shows, that she became the guardian of Miss Vaughan in the year 1830; the commencement of her account, as guardian, must necessarily be limited to that date. The rule, that the *allegata* and *probata* must correspond, has the same reason to support it in equity, as at law. The bill makes a claim for money alleged to have been expended

Davis, et al. v. Roberts.

upon Miss Vaughan, as the complainant's "ward," and she exhibits an account which goes back to the year 1815, when the proof shows that the relation of *guardian* and *ward* did not commence until in the year 1830. There is no claim set up by the bill upon the principles of an implied assumpsit, on the part of Miss Vaughn, to account for money expended in furnishing her with necessaries. This might perhaps have been sufficient to authorize the complainant to go behind her letters of guardianship, in stating her account. But then it would have been confined to absolute necessities, according to all the legal restrictions and qualifications upon that subject. The account is, therefore, erroneous upon its face, so far as it is allowed the complainant, prior to the year 1830, there being no foundation laid by the bill and testimony for that branch of the report. In such case it is well settled, that the report may be objected to at the hearing, even in the absence of exceptions. *White's exec'rs v. Johnson*, 2 Munf. R. 285. The interlocutory order to account, instead of admitting the complainant's right to an account, previous to the year 1830, contains a strong implied denial of such right, by requiring that portion of the account to be distinguished from the other, and reserving the question of its legality to be subsequently passed upon by the Court. This seems to me to be the scope and effect of that order.

And now, having freed the case from these technical difficulties, the question is, What decree should be rendered upon the merits of the case? I have no difficulty in declaring, that if the bill had been broad enough to admit such inquiry, I should still have held, that that portion of the account embraced between the years 1815 and 1830 was improperly allowed. It is clear from the complainant's own report, and from the deposition of Stafford (both of which were improperly excluded by the commissioner), that she took charge of Miss Vaughan from mere motives of friendship to her mother, without the intention, or expectation, of charging her with the expenses of board and education. The rules of both law and morality require, that what was intended as a mere gratuity, shall not be converted into a pecuniary demand. The idea of making a charge at all, was evidently an afterthought, and does not appear to have been suggested, until after the death of Miss Vaughan, or, at least,

Davis, et al. v. Roberts.

not until 1830, when letters of guardianship were taken. The report of Mrs. Davis, as guardian, made to the Probate Court of Wilkinson county in 1832, states, that she had kept no account against her ward, and that, from the strong ties of friendship for the mother of her ward, she had been induced to raise and educate the latter at her own expense. The deposition of Stafford proves, that he was desirous of taking the child, and offered to do so, and raise her at his own expense, but that Mrs. Davis would not consent to it. Under these circumstances, there is no foundation in law or in fact, for any charge prior to the year 1830. 2 M'Cord, Ch. Rep. 56; 1 Munf. Rep. 119. But even if the complainant had been regularly appointed guardian, in the year 1815, still the prayer of the bill for the sale of the principal property of the ward could not be granted. A guardian who expends more money upon his ward than the income of the ward's estate, does it at his peril. It is well settled that a guardian cannot trench upon the principal property of his ward by exceeding his income, without authority for that purpose from the appropriate tribunal. Here the complainant, if her accounts were allowed, having exceeded the income of her ward, has no claim to have the principal property sold to reimburse her in such excess, much less a right to retain the property for that purpose.

Upon the whole, I shall direct the order of confirmation to be vacated, as having been irregularly obtained; and that the exceptions of the defendant to the report be sustained, as to so much of the account as goes behind the year 1830; and that the report as to the remainder of the account be confirmed: that the exceptions of the complainant be disallowed; and that the defendant have a decree over against the complainant Davis, for the difference between the charge of hire for the negroes, and the charge of board, &c., from 1830, as reported; that the injunction to the suit at law be dissolved, and that the complainant, L. Davis, pay the costs of this suit.

At first, I had some doubt, whether, upon sustaining a part of the exceptions to the report, it would not be necessary to refer it back for a restatement of the account; but, upon an examination of the practice upon this subject, I find it is unnecessary. Where ex-

554 SUPERIOR COURT OF CHANCERY.

Davis, et al. v. Roberts.

ception are allowed to a report, reducing the amount of the account reported, the Court can modify the report, and settle the true amount upon the evidence reported, without referring it back to a commissioner. *Taylor v. Reed*, 4 Paige, Ch. R. 561.

Let a decree be prepared in accordance with these views.

DECEMBER TERM, 1843.

CANNON v. KINNEY, et al.

C., being the administrator of a deceased mortgagor, was garnisheed by B., a creditor of the mortgagee, and answered, admitting the debt; and judgment was rendered against him; C. afterwards found that the mortgagee had previously transferred the mortgage notes to G., who insisted on their payment to him; C. filed his bill, making them all parties, and requiring them to interplead, and settle their conflicting rights to the mortgage debt, and praying an injunction against the judgment of B.; *held*, the case presented by the bill was a proper one of interpleader, and that the judgment of B. should be enjoined, until it was ascertained whether the transfer of the notes was before or after the judgment, and if before, that the judgment of B. should be perpetually enjoined.

Pending a bill, filed by an administrator, to ascertain to whom notes secured by a mortgage, made by his intestate, should be paid, the estate of the mortgagor was declared insolvent, which fact was made the matter of a supplemental bill by the administrator; *held*, that the insolvency of the estate did not suspend the action of the Court, in granting a decree in the case, or the right of the successful litigant to a sale of the mortgaged premises, to pay his debt.

IN this case an injunction had been granted, staying an execution at law in favor of the Agricultural Bank against the complainant. The bank moved to dissolve the injunction, and the cause was submitted upon that motion, and also, if the case was considered in readiness for it, for a final decree.

CHANCELLOR. The complainant, as the administrator of a deceased mortgagor, was garnisheed by the Agricultural Bank as a creditor of the mortgagee. Upon that process, the complainant answered, admitting the indebtedness by his intestate, and thereupon a judgment was rendered in favor of the bank against him, as administrator. He now alleges, that the notes, which constituted the evidence of such indebtedness on the part of his intestate, had been transferred by the mortgagee to third persons, at the time of the suing out of the garnishment, and that he did not then know that fact. That the bank is attempting to enforce the judgment, and the holders of the notes threatening to enforce the mortgage. The bill makes them all parties defendant, and prays, that both

Cannon v. Kinney, et al.

claimants may be enjoined from further proceeding, until they interplead and settle their conflicting claims. The case of *Oldham v. Ledbetter* (1 Howard, 49) decides the question as to the propriety of the interpleader. The defendants, Gale and others, as the holders of the notes which the mortgage was made to secure, insist upon their right to the money therein called for, in opposition to the bank, and for a foreclosure of the mortgage. The complainant afterwards filed a supplemental bill, suggesting the insolvency of the estate. The first point to which my attention is asked by the counsel is, whether the bill can be sustained at all after the suggestion of the insolvency of the estate by the supplemental bill. I perceive nothing in the nature of the case, or in the legislation of the State, to prevent the case from progressing on the original bill, because, whichever of the claimants succeeds, will be entitled to call for the exclusive application of the proceeds of the mortgage property by virtue of their right, derived through the mortgagee, and will not be forced to a *pro rata* dividend, with the general creditors of the estate of the deceased mortgagor. The mortgage property, except so far as it may exceed the payment of the mortgage-money, will not come into the fund for distribution among the general creditors. I have no doubt then, that the bill was properly filed, and that the defendants are properly required to interplead. The only question between them, is the point of time at which the transfer of the notes was made. If this is agreed on by counsel, I am prepared to direct a final decree in the case, otherwise, it must stand over for proof. If Kinney's answer is admitted as evidence, the question is settled. It is clear, that his deposition would be admissible, but his answer can only be admitted by agreement. If agreed to, there must be a decree of foreclosure, and sale of the mortgaged premises, with directions to apply the proceeds, first to the payment of the notes held by the defendants, Gale and Reed, and if there be any surplus, that it be paid to the Agricultural Bank, and the bank will be perpetually enjoined from enforcing the judgment, as to any balance not satisfied by such surplus.

Dick, et al. v. Truly, et al.

DECEMBER TERM, 1843.

JAMES DICK, et al. v. JOHN H. TRULY, et al.

J. H. executed a note with W. H., as his surety, to L. M. & Co., and to indemnify W. H., J. H. conveyed property in trust to T.; L. M. & Co. transferred the note to D., who, J. H. becoming insolvent, filed a bill to subject the property conveyed in trust, to T., to the satisfaction of his debt; *held*, that the trust property was liable in equity to the payment of the note in the hands of the assignee.

L. M. & Co., being the holders of a note, secured by mortgage of W. H., received from a transferred claim belonging to W. H. the sum of \$1100, in depreciated paper, but refused to deliver it to H., when called for; L. M. & Co. afterwards transferred the note of H. to D., who filed a bill to foreclose the mortgage; *held*, that H. was entitled to a credit of the \$1100 in specie.

A judgment in Tennessee, and return of *nulla bona* upon an execution thereon, are not sufficient foundation to apply to a court of equity, to subject the *chooses in action* of the judgment debtor, to the payment of the debt.

This cause was submitted for a final decree, upon the bill of the complainant, and the answer of James Hanna, and *pro confesso* against the other defendants, and the depositions in the case. No abstract of the pleadings and proof is given; the only points of interest involved being a question of law and of fact, stated at length in the opinion of the Court.

Wilkinson, and Miles, for complainants.

This cause is now submitted for final hearing, on the answers of, and *pro confesso* decree against, the defendants.

The only difficulty presented in the case is the credit of \$1100, claimed by James Hanna. We do not think it can be allowed. There is no proof that the sum, thus claimed as a credit, ever came into the hands of "Leigh, Maddox, & Co.", from whom complainants obtained the note, upon which judgment in Tennessee was rendered.

But should the Court deem it equitable to allow the credit claimed, we then ask for a decree against John H. Truly, for an equal amount out of the judgment, described in the bill as having been recovered in the Holmes Circuit Court. It is immaterial to us which way we get the money, though we are anxious to see the wishes of Wm.

Dick, et al. v. Truly, et al.

Hanna subserved, and, for that purpose, ask a decree of subrogation, giving to complainants the same rights, under the trust-deed, as those conferred by its provisions on Wm. Hanna.

Brooke, for defendant, James Hanna.

The defendant, Hanna, contends only for a credit of about \$1100, which he states he paid J. S. Ewing, one of the firm of Leigh, Maddox, & Co., to whom the deed of trust was made. It is proven by the deposition of John H. Truly (who, it is presumed, is a competent witness, being only a nominal party, as trustee, and equally interested for both parties), that a note of about \$1100 was given Wm. Hanna, in part payment of the debt due Leigh, Maddox, & Co., and for which Wm. Hanna was surety; that suit on said note was brought for the use of said Leigh, Maddox, & Co., or Ewing, and the amount collected in Brandon money; that though Ewing refused to receive said Brandon money, he also refused to let Hanna have it, although he, James Hanna, could have used it. It is, therefore, contended that Ewing, or the firm of which he was a member, should account for it, as he (Ewing) had no right to play the part of the dog in the manger. That said Ewing was a partner of said firm of Leigh, Maddox, & Co. is in proof. Should this credit be allowed, the rest of the debt is not disputed, and the trust-property is ready to be delivered up, or rendered subject to it. At the time the answer was written, it was supposed that a copy of the record of the judgment on said note would be obtained in due time; but before it was filed, in consequence of not knowing the term of the Court at which the judgment was had, and the unwillingness of the clerk to take the trouble to hunt for it, the reference thereto was, at the instance of the defendants, and before the filing of the answer, erased. If the Court, however, should think the proof sufficient to authorize an order of reference to ascertain the amount of said judgment, steps will be taken to procure it.

W. Thompson, for William Hanna.

I appear for Wm. Hanna, against whom, I understand, the complainants do not claim a decree, except in the event John Hanna gets a credit for the note he gave Ewing. If John Hanna gets that

Dick, et al. v. Truly, et al.

credit, the effect of course will be, to diminish complainants' demand to that extent; for the complainants claim under the firm of Leigh, Maddox, & Co., of which company Ewing was a member, as appears by the record of the judgment from Tennessee, under which complainants claim. John H. Truly, in the last lines of his deposition, shows the note was given on the present claim set up by the complainants. Wm. Hanna is willing and desires that complainants have a decree for the sale of the trust of property, to pay the amount of their demand, as it may be ascertained by the decree of the Court.

CHANCELLOR. The complainants, as the creditors of Leigh, Maddox, & Co., received from them a claim on James Hanna, to which Wm. Hanna was surety. To indemnify Wm. Hanna against his liability as surety, James Hanna made a deed conveying particular property in trust to John H. Truly. The complainants allege, that James and Wm. Hanna are both insolvent, and ask to have the deed of trust enforced for their benefit. The leading facts are admitted by the answer and *pro confesso*. It is urged by the defendants, that this claim should be credited by \$1100, received by a member of the firm of Leigh, Maddox, & Co., through the medium of a transferred claim. I am clear, from the testimony, that the credit should be allowed. Although Ewing received it in depreciated money, yet by refusing to deliver it to Hanna, when called for, he thereby elected to make it his own, and the claim must be credited to that extent. I can have no doubt, that the complainants, as the assignees of the claim, are entitled to have the deed of trust enforced, for the satisfaction of their debt. Where the principal debtor pledges property to his surety, by way of indemnity, and the principal becomes insolvent, the creditor has a right in equity to have the property so pledged applied in payment of his debt. *Wright v. Morley*, 11 Ves. 22; 1 Story's Eq. 592. The complainants have no right whatever to have the judgment rendered for the use of Wm. Hanna, in this State, or any part of it applied to the satisfaction of their claim. The judgment and return of *nulla bona*, in Tennessee, is not sufficient to lay the foundation for such a claim. Let the case be referred, for an account and report of the

560 SUPERIOR COURT OF CHANCERY.

Dick, et al. v. Truly, et al.

principal and interest due, after deducting the credit referred to.
Upon the coming in of the report, a final decree, enforcing the deed
of trust, in favor of the complainants, may be drawn.

DECEMBER TERM, 1842.

JOHN CRISMAN, et al. v. A. G. BEASLEY, ADMINISTRATOR OF
JAMES BEASLEY.

C. filed his bill, alleging that B., administrator, sold a lot of ground of his intestate, to him, representing that he had full power to sell, when in fact he had none, and no order of court had been obtained for that purpose; that he had executed his note for purchase-money, had been sued, and judgment had been obtained against him; that he did not know, until after judgment, that B. had had no power to sell, and that he had no order for that purpose; B. demurred to the bill; held, that the bill presented a good case for relief; that B. was guilty of fraud in the misrepresentation, and that the demurser must be overruled.

Where an administrator sells property of his intestate, there is an implied covenant with the purchaser, that he has authority to sell.

An allegation, that the complainant did not come to the knowledge of the defect of his vendor's, who was an administrator, power to sell, till after the judgment at law in favor of the vendor for the purchase-money, is a sufficient excuse for not having made the defence at law.

It is essential to the validity of an administrator's sale, that the probate record disclose a substantial compliance with the requirements of the statute on that subject.

THIS cause was submitted, on demurrer to the complainant's bill.

CHANCELLOR. Crisman purchased a lot of ground in the city of Jackson, from A. G. Beasley, who professed to sell under an order of the Probate Court of Hinds county, made at his instance, as administrator of James Beasley. The note given for the purchase-money was sued on, and a judgment obtained at law; to enjoin that judgment is the object of this bill, the equity of which rests upon the allegation, that the administrator represented that he had sufficient authority to sell; whereas, the order of the Probate Court, under which he acted, was null and void, not complying with the law on that subject, and that the sale was itself void, and passed no title; that he has learned these facts since the rendition of the judgment at law. The defendant, Beasley, has demurred to the bill, and whether that demurrer is well taken or not, is the question for decision. The objection is, that the complainant's defence was at

Crisman, et al. v. Beasley.

law, and that, having failed to make it, he is precluded from relief in this Court. Several answers may be given to this suggestion.

1. The bill alleges, and the demurrer admits, that the defendant represented that he had full power and authority to make sale of the lot. Now the administrator was bound to know whether he was legally and fully authorized to make the sale or not; it was his duty to see that all the steps by which he derived his authority were regular and legal; and if, as is alleged, he induced the complainant to purchase the lot, by asserting that he had the authority of the law for the sale, when in truth he had not, it was a fraud upon the complainant, against which he is entitled to relief in this Court; and the same principle equally applies, if the administrator acted under a void authority. Although an administrator, in selling property by order of the Probate Court, gives no covenant of warranty of title; yet there is a clear implied covenant with the purchaser, that he has authority to sell.

2. In the next place, it is distinctly alleged in the bill, that the complainant did not come to a knowledge of the defect in the authority of the administrator to sell, until since the trial at law. I have heretofore decided, that, in order to the validity of sales of this description, it is essential that the probate record shall disclose a substantial compliance with all the requirements of the statute upon that subject. The power given to the Probate Court is in the nature of a special power, and, like all other special authorities, must be strictly pursued. A copy of the record of the Probate Court, which is exhibited with the bill, only shows that a citation to those interested in the lot had been "ordered," at a former term, without showing whether there had been any execution or return thereof; this falls far short of the provisions of the statute. See How. and Hutch. Dig. 419. This copy does not purport to be a complete transcript of the whole proceedings; whether a more complete copy of the record will remove the defects complained of, I cannot now anticipate.

Let the demurrer be overruled, with leave to answer.

DECEMBER TERM, 1840.

M. B. HAMER, et al. v. JOHNSTON, et al.

J. R. MARSHALL v. MORTON, et al.

P., about to trade with D., for the note of H., went to H. to inquire if the note was good ; H. answered, it was good, and would be paid at maturity ; P. thereupon traded for the note, and afterwards assigned it to J. (informing him of H.'s statement), who sued H. thereon ; *held*, that H. was precluded by the representations made to P., from setting up as a defence to the suit by J. any failure of consideration between himself and D., the original holder of the note.

THE two cases above stated were submitted to the Chancellor at the same time, the facts in each case being precisely the same, *mutatis mutandis*.

The bill stated, in substance, that Willie Davis proposed to sell to complainants ten sections of land, claimed by said Davis, as assignee of certain Choctaw Indians, who claimed by virtue of the 14th article of the treaty of Dancing Rabbit Creek; and that relying upon the repeated statements of said Davis, that he was in truth an assignee, claiming directly from the said Choctaw Indians, the complainant agreed to purchase said ten sections, for the sum of \$9669, to secure which, he gave him his two promissory notes ; that said Davis, at the time, executed a bond to convey said ten sections, which is as follows :—

“ This instrument of writing witnesseth, that the undersigned has this day sold thirty sections of land, which he claims as assignee of certain Choctaw Indians, who are or were entitled to said lands, by virtue of the 14th article of the treaty of Dancing Rabbit Creek ; that ten sections of said number have been sold to John B. Marshall, ten to M. B. Hamer, five to P. B. Pope, and five to Edward C. Wilkinson ; that said sections are of an undivided interest in a number of sections, which said Davis claims ; and that, after the above claims shall have been ratified by the government of the United States, that the said parties are to divide their interests from the said Davis's residuary interest, should he have any, after satis-

Hamer, et al. v. Johnston, et al. Marshall v. Morton, et al.

sying the claims of the said vendees in the premises, and from that of each, by casting lots for the different locations."

The said Davis also executed to said Hamer a bond, with the following condition:

"The condition of this obligation is such, that if the said Willie Davis, his heirs, executors, &c. shall make, or cause to be made to the said Malachi B. Hamer, a good and valid title to ten sections of land, claimed by the said Davis, as assignee of certain Choctaw Indians and the United States, at Dancing Rabbit Creek, whenever the said Davis shall obtain a title to any of said lands himself, or whenever any other person shall obtain a title for his use, then this obligation shall be void; otherwise, to remain in full force and virtue."

The bill charged, that said Davis was not the assignee of the Indians, as he represented, and that he had no title, or pretence of title, which he agreed to sell; but that an individual named Johnston was the purchaser of a large body of lands from the Indians, and that he took an assignment of the right of said Indians directly to himself and in his own name; and that, shortly after his said purchase, the said Johnston verbally agreed with the said Davis, to let him have a limited interest in said purchase, provided the said Davis would advance a certain sum of money, to enable the said Johnston ultimately to secure the titles by sanction from the government of the United States; that Davis never did comply with said conditions, and said Johnston now disclaims any interest on the part of said Davis; that Davis has died, &c.

The bill further stated, that the notes given for the land had been assigned, and suit instituted by the assignees, and prays an injunction.

The answers state, that they know nothing of the consideration of the notes, or any fraud of Davis, and require full proof. The answer of the assignees further stated, that said notes were assigned to Granville S. Pierce, by said Davis in his lifetime, before they were due, for a valuable consideration, to wit, for eighteen valuable slaves, sold to said Davis, for said notes, by said Pierce; that said Pierce had no notice of any equity between the parties at the time of said transfer; that said Pierce, with a view to be perfectly safe, before he agreed to receive said notes, and before he

Hamer, et al. v. Johnston, et al. Marshall v. Morton, et al.

traded for them, went to Hamer and Marshall, with a view to ascertain whether he could trade for the notes with safety, and asked them if the notes were good, or would be paid by them. They assured Pierce that there would be no difficulty about the notes ; that they were good, and would be punctually paid when they fell due; that thereupon Pierce, upon the assurances so made to him, purchased the notes. It further appeared in proof, that Pierce kept the trade open, and did not close it with Davis, until he could see Hamer and Marshall, and receive the above-stated assurances, and that upon said assurances, he closed his contract with Davis. There was no affirmative allegation or proof, that Hamer was informed that Pierce was about to purchase the notes, at the time the assurance of payment was given. Complainants alleged, that, at the time they made their assurances and promises to Pierce, they did not know of their defence against the notes, and that it had subsequently come to their knowledge ; that said assurances were made in good faith, and without any intention to defraud or deceive. It was further proved by Pierce, that the notes were assigned to him before they were due, for the above-stated consideration, and without notice of any defence.

The answers further alleged, that the present holders of the notes took them upon the representations of Pierce of the assurances of the makers, that the notes were good and would be paid. Pierce was examined as a witness, and stated, that he thought the assurances of payment were the inducement with the present holders of the notes to take them, but also thought the notes would have been purchased by the present holders without said assurances.

Holt, for complainants.

The fraud charged to have been committed by Davis, upon complainant, is fully established by the testimony, and if the holder of the note occupies no stronger position in this controversy, than Davis himself would had he never transferred the paper, complainant is certainly entitled to a decree perpetuating the injunction and rescinding the contract.

Complainant, under the statute, has the same right to impeach the consideration of the note in the hands of Morton, that he

Hamer, et al. v. Johnston, et al. Marshall v. Morton, et al.

would have, were it held by Davis. Has he done any act, which in law, will amount to a waiver or forfeiture of this right? It is confidently insisted that he has not.

It is true that Pierce, the assignor of Morton, and assignee of Davis, when about to purchase the note, asked complainant if it was good, and was assured by him that it was, and would be punctually paid, and that he afterwards traded for the note on the faith of this assurance. But it is denied that this assurance, thus given, will deprive complainant of that protection against fraud and overreaching, which the statute referred to has thrown over the makers of commercial paper. Before such a representation can work a forfeiture of his rights under the statute, it must be shown affirmatively by the party insisting on such forfeiture:

1. That complainant, when he made the representation, *knew it to be false*, was conusant of the fraud which Davis had practised upon him, and concealed it.
2. That complainant, at the time he made the representation, was fully aware that Pierce was about to purchase the note upon the faith of it.
3. That not merely Pierce, but that Morton, the present holder of the note, confided in the assurance of complainant, that it was good, and was induced thereby to purchase it.

Judge Tucker, in his "Commentaries," lays down the principles contended for, in the following clear and forcible language:

"If, before the assignee takes an assignment, he applies to the obligor, informs him of his design to buy, and requests to be informed if he has any objection to payment; if the obligor is aware of his equity, and conceals it, he cannot afterwards set it up against the assignee, who has been thus induced by his representation and fraudulent conduct to pay his money for the bond. In the case put, the obligor is supposed to know of his equity, and to have concealed it. Suppose, however, he did not know it, shall he lose his equity (previously existing) by his promise of payment? I think not. He loses his equity only by reason of his fraudulent concealment, and where he did not know of it, he can have been guilty of no fraud and shall come to no loss." 1 vol. title *Assignment*, c. 25.

Hamer, et al. v. Johnston, et al. Marshall v. Morton, et al.

In *Honore v. Dougherty et al.*, 4 Bibb, 280, the assignee of a promissory note sought to recover against Pope, the surety, on the ground that he had made to him, when about to purchase the note, assurances that it was good. It was shown, on the part of Pope, that when this assurance was given, he was ignorant of the fraud which had been practised upon his principal. It was held that a representation, made under these circumstances, although it superinduced the purchase of the note, could not be made the basis of a liability. "It is," say the court, "in fact, nothing short of an attempt to charge a man for telling what he knew when requested, because he did not know more."

Shreve v. Olds, 2 Marshall, 141, 142, is a leading case in Kentucky. The obligor in the bond had induced the assignee to purchase it, had renewed it to a creditor of the obligee, and had made repeated promises of payment; never disclosing that the consideration of the instrument was vicious, although this fact was well known to him. It was determined that he could not be relieved; and the court, in giving its opinion, base it upon the ground that the obligor "with full consciousness of his legal exemption from liability, promised payment."

Buckner v. Smith, 1 Wash. 296; *Hoomes, executor of Elliot v. Smock*, 1 Wash. 399, are to the same effect; and all subsequent adjudications in Virginia have conformed to them. In the first, the obligor not only gave assurances of payment to the assignee, and thereby induced him to purchase the bond, but he concealed from him the legal objections which existed to its payment, and persevered in such concealment until after there had been a judgment at law by confession. The court held him bound because of this fraudulent concealment, at a time when common honesty required that he should have disclosed his defence. In the other case, there was the same concealment by the obligor of his defence to the bond. He influenced the assignee to buy it, renewed it without making known his objection, and afterwards suffered a judgment to pass at law. As a previous knowledge of his defence was brought home to him, his conduct was very properly held to be fraudulent, and relief denied him.

In *Lomax v. Picot*, 2 Rand. 271, where the drawer of a note

Hamer, et al. v. Johnston, et al. 'Marshall v. Morton, et al.

had induced another to take an assignment of it, assuring him it would be paid, and it turned out that the title to the property for which the note was given was defective, the drawer was held liable, because he made the assurance with a full knowledge of all the facts connected with his title, and he was bound to know the law arising upon those facts. "If the appellee knew at that time that the title might prove defective, and, notwithstanding, gave the promise, it would be a waiver of his equity, as that promise induced the purchase of the note." All the judges, in delivering their opinions, trace the drawer's liability to his knowledge of the facts which rendered his title defective; and although it is not declared in so many words, yet the inference is irresistible, that he would have been discharged, had he been ignorant of these facts, at the time he made the promise of payment. The case of *De Costa v. Shrewsbury*, 1 Bay. 211, is a stronger authority in favor of the position assumed, than any which has been cited from Kentucky or Virginia.

The extent, to which third persons shall be held responsible for representations made by them in regard to the subject-matter of contracts in progress between others, has been a fruitful source of discussion and adjudication in England and America. The case at bar is obviously of that character. So far as I have had access to the decisions upon this subject, they uniformly hold, that a party making such representations is not liable, unless he made them fraudulently, and with a knowledge of their falsehood.

In the great case of *Pasley v. Freeman*, 3 T. R. 51, this question was elaborately argued by the judges, and settled upon grounds which have never since been disturbed. That was an action against the defendant for having given a false representation of the credit and circumstances of a third person to the detriment of the plaintiff. It was determined, that the ground of such an action is the intention to injure and deceive the plaintiff, and that to entitle him to recover, it must be proved that the representation was false; that the defendant making it knew it to be so, and he made it with a fraudulent intent. The principle of this decision applies without qualification to the case at bar. Pierce finding the note of complainant in the market, and being desirous of purchasing it from

Hamer, et al. v. Johnston, et al. Marshall v. Morton, et al.

Davis, applies to complainant to know whether it is good. Complainant assures him that it is ; and he buys upon the faith of this assurance. Complainant was no party to the contract in progress between Pierce and Davis ; he sustains to them, and to the transaction, the relation of a neutral third person ; precisely the relation sustained by the party who made the representation in *Pasley v. Freeman*. It is not enough, then, for Pierce, or his assignee, to urge that the representation of complainant has been confided in, and that great loss must ensue if the contract be cancelled. The same argument was pressed in vain in the case referred to. Defendant must go one step further, before liability is made out. To credit given, and loss suffered, the all-important ingredient of fraud, alleged and proved, must be added. 2 Stark. Ev. title *Deceit* ; 7 Vermont, R. 70 ; 13 Vesey, 131 ; 6 J. R. 181 ; 6 Cowen, 346 ; 2 Wend. 385 ; 7 Ibid. 1 ; 2 East's R. 92 ; *Irwin v. Shirrell*, Taylor's R. 1 ; 3 Rand. 410 ; 3 Bos. & Pull. 367 ; 8 John. 23.

Equally analogous to the one under discussion, is that numerous class of cases, where a man having title to, or a mortgage upon, an estate, stands by, and either encourages or does not forbid its purchase, or the predication of loans, or erection of improvements upon it ; he is bound by such conduct, as a just punishment for his concealing his right ; by which an innocent man is drawn in to lay out his money. All the cases, however, when examined, will be found to fix the party's liability upon this basis ; that he knowingly and fraudulently concealed his title or mortgage, at a time when it was his duty to have disclosed it. Fonb. Eq. B. I, ch. 3, sec. 4, note. In *Dyer v. Dyer*, 2 Ch. Ca. 106, Lord Chancellor Finch held, that if the party be ignorant of his title, his silence, under such circumstances, will not compromit his rights.

Ainslie v. Medlycott, 9 Vesey, 13, was a bill filed by a husband to have his wife's portion, part of which was in stock, made up money, on the ground either of express contract, or representation. The bill was dismissed, because the representation though untrue, and probably the inducement to the marriage, proceeded not from fraud, but mistake.

Hamer, et al. v. Johnston, et al. Marshall v. Morton, et al.

In *Burrows v. Locke*, 10 Vesey, 474, 475, the defendant had expressly represented to complainant, that C. had an undoubted right to make an assignment to the amount of two hundred and eighty-eight pounds, well knowing that he had no such right. Complainant acted upon the faith of this representation. The defendant sought to excuse himself by alleging, that, although he had received information contrary to what he had represented, he did not recollect it.

The Chancellor in that case decided that :

"To make out a case of this kind, it is necessary to prove only, 1st. That the representation is false. 2d. That the person making the representation had a knowledge of a fact contrary to it." See also 6 Vesey, 181, 182, 183, *Evans v. Bicknell*, where the position insisted on is laid down with singular clearness and force. *Dolbair v. Dolbair*, 16 Vesey, 125.

In *De Mannville v. Compton*, 1 Ves. & B. 355, a party to a marriage settlement was sought to be held responsible for a note of hers, of two thousand pounds, which it was alleged had been fraudulently cancelled, after it had been represented as constituting a part of the wife's fortune, on the treaty for the marriage. Relief was denied, because it did not appear that the marriage took place on the faith of the representation, and because there was no ground to infer fraud.

In *Pearson v. Morgan*, 2 Bro. C. R. 389, A., the owner of an estate charged with eight thousand pounds in favor of B., was applied to by C., who was about to lend money to B., to know if the eight thousand pounds was still a subsisting charge on the estate. A. replied that it was ; and C. lent his money accordingly ; it appearing afterwards that the charge had been satisfied, it was held that the money lent was a charge on the lands in the hands of A. But upon what principle ? Upon the ground that A., when he represented the charge as subsisting, had express notice that it had been satisfied. The learned judge, in delivering his opinion, uses this language :

"It is always considered as a constructive fraud, when the party knows the truth and conceals it. I think, that here James Butler (the owner of the estate) knew of the proviso and advancements,

Hamer, et al. v. Johnston, et al. Marshall v. Morton, et al.

and that, in this Court, he was bound to take notice of them ; in fact, he had express notice, and it is not like the case of a later deed referring to a former one. He having admitted the lien to be in existence, is bound by his admission, as he had full notice, and induced the plaintiff to lend his money.”

The cases examined above are cited by Judge Story in his treatise on Equity, 1 vol. 202, as supporting the proposition, “that it is wholly immaterial, whether a party misrepresenting a fact knew it to be false, or made the misrepresentation innocently, by mistake.”

With deference to the learned author, these cases, and the reasoning upon which they proceed, fall far short of sustaining the position which he has assumed. Instead of treating the *scienter* as immaterial, they invariably present it as the only legitimate basis of responsibility. In 9 Mod. R. 56, it was held, that wherever anything in order to a purchase is publicly transacted, and a third person knowing thereof, and of his own right to the lands intended to be purchased, and doth not give the purchaser notice of such right, he shall never afterwards be permitted to set up such right to avoid the purchase.

In *Evans v. Llewellyn*, 2 Bro. C. R. 150, it was determined, that a conveyance obtained from a person uninformed of his rights, will be set aside, though there is no actual fraud or imposition. In *Neville v. Wilkinson*, 1 Bro. C. R. 543, also cited by Judge Story, Neville was deeply embarrassed, and being about to marry an heiress, to whose father he had represented that his debts did not exceed eighteen thousand pounds, he prevailed on the defendant, a large creditor of his, to conceal from the father the amount of his claim ; alleging, that if it should become known to him, the match would be broken off, and he himself involved in ruin. The defendant, accordingly, though present when the articles of settlement were drawn up and executed, actively concealed the existence of his debt. He afterwards attempted to have it satisfied out of the fund provided by the settlement for the payment of Neville's debts. It was held, that he was entitled to no relief. He was conusant of his claim, and deliberately suppressed it, at a time

when, in common honesty, he was bound to have made it known. What countenance does this decision give to the position that misrepresentations made by mistake and those made by design, stand upon the same footing?

The same question may be asked in relation to *Carr ex parte*, 3 Ves. & B. 110, 111, 112, where the whole train of the Chancellor's argument presupposes, on the part of him making the representation, knowledge of its falsehood.

In *Steward v. Luddington*, 1 Rand. 405, 406, 407, Luddington, under a *mistaken supposition*, that a particular slip of ground was vacant, located a warrant upon it. Lockhart, under patents, afterwards claimed the land, and, upon running his lines, the surveyor gave it as his opinion, that they could not be extended, so as to embrace the slip entered by Luddington, whereupon Lockhart abandoned all claims to the land in question, and Luddington, *on the faith of this abandonment*, went on to perfect his title, procured a patent, and sold to Perkins, who sold to C., who sold to N. It was afterwards discovered, that Lockhart was *mistaken* in supposing that his patent did not cover the strip of land entered by Luddington, and suit was brought to recover it. Held, that neither Lockhart nor his assignee was bound by an abandonment of his claim, thus made under a mistake. "The transaction," says the Court, "has nothing of the character of a contract, there being no consideration passing between the parties, and if there had been a contract, under the circumstances, it would not have been binding, being made upon an erroneous opinion of Lockhart, in relation to his rights. Nor on the ground of fraud was he bound; no concealment or misrepresentation can have that effect, unless it be collusive or fraudulent, or the negligence be so gross, as to amount to proof of fraud."

Misrepresentation, *without design*, is not sufficient for an action; it must be made in *bad faith*. 2 Kent, Com. 490; *Green v. Price*, 1 Munf. 449; 1 J. C. R. 344; 7 J. C. R. 201.

The distinction between representations made by parties to a contract, and those made by third persons, should never be lost sight of. The former may, with much show of justice, be required to make their representations good; whether innocently or fraud-

Hamer, et al. v. Johnston, et al. Marshall v. Morton, et al.

ently uttered, because *they are paid for doing so*. A valuable consideration passes to them, on the faith of such representations ; and if they prove untrue, in making compensation, they do but return that which in conscience belongs to another. Not so with third persons. They act *without consideration* ; have no connection with the contract, which may be influenced by their representations, and are *without motive to fraud or falsehood*. Thus circumstanced, no principle of law, sound morals, or of public policy, will hold them responsible for *mere mistakes*, honestly committed. To establish a different rule, would be to place a padlock on every mouth in the land. Men would fear to answer the most ordinary inquiries, touching their business and interests, lest they should incur pecuniary liability.

The only authority cited by Judge Story, which seems to sustain his position, is Marshall, Ins. B. 1, c. 10, s. 1. The author, however, is treating not of representations made by third persons, but of those made by the *parties to the contract of insurance*. "The contract of insurance," says Mr. C. J. Kent, "is formed upon principles peculiar to itself, and the common-law maxim of *caveat emptor* has no application, and professes to have none. The insurer is essentially *passive*, and is known to act, and professes to act, upon the information of the assured." Volume 2, Com. 488, note.

It is only in insurance cases, that even parties to contracts are generally held responsible for misrepresentations made by mistake, and their responsibility, in that class of cases, rests upon grounds distinct and anomalous in their character. But third persons would not be [held liable for representations, innocent though untruly made, in regard to the subject-matter of a contract, even of this favored class.

No effort, it is supposed, will be made to give to complainant's representation the character of a contract. If a contract, it is void, for want of consideration, and because made in utter ignorance of the all-important fact, that he then stood legally discharged. Ignorance of the law, will not impair the obligatory force of contracts, but ignorance of facts, always will. "To make a receipt in full of all demands a conclusive bar, it must be given with full

Hamer, et al. v. Johnston, et al. Marshall v. Morton, et al.

knowledge of all the facts." Esp. N. P. 156, 174. Complainant, if his representation amounted to a contract, would stand in the situation of a party to a bill of exchange or promissory note, who, being discharged for want of notice, is ignorant of such discharge, and promises to pay. It is held, in all the authorities, that such promise cannot be enforced. It is not for the defendant, when sued on such a promise, to show, that when he made it, he was ignorant of his discharge, but it is for the plaintiff to prove, affirmatively, that he had knowledge of it. 16 Johns. R. 152, 153, 154. The reason why such promises are not binding, is, that the defence resulting from want of notice is sufficient, unless it has been waived, and that the party cannot be construed to waive that of which he has no knowledge. A contract implies necessarily the assent of at least two minds. Can the mind, upon any principle of interpretation, be supposed to assent to that of which it was utterly ignorant? Complainant did not promise to pay the note to Pierce; he merely assured him that it would be paid. The note upon its face said as much. How could complainant be regarded as promising payment specially to Pierce, when he was not even apprised of his intention to buy the note? Must not contracts be mutually obligatory, to be valid? If complainant was bound by his promise to pay, what was Pierce bound to do, in return? Nothing. He might buy the note or not, as he chose.

No decision (the *nisi prius dictum* in 2 Yeates, deserves not so respectful an appellation) has attempted to place representations, of the kind under discussion, on the footing of contracts.

We think it fully established by the authorities, that complainant cannot be deprived of his rights of defence under the statute, unless it be proved affirmatively, by the defendant, that the assurance of payment was given to Pierce, with a knowledge that the consideration of the note had failed. Defendant has not attempted to fix upon complainant any such knowledge. Fortunately, however, complainant has been enabled to show, that he remained in ignorance upon this subject, up to the maturity of the note; that he went to the bank for the purpose of paying it, and was then, for the first time, apprised by the cashier, Hughes, of the fraud which

Hamer, et al. v. Johnston, et al. Marshall v. Morton, et al.

Davis had practised. The note fell due 1–4 January, 1838, and the assurances to Pierce were given some time in the month of February, 1837. It does not appear that complainant had any notice of the transfer of the note until its maturity ; nor is it clear that even then he was apprised of it, as it is not stated that the note was exhibited, during the conversation between him and the cashier of the bank. He may not have had notice of the assignment until the institution of the common-law suit.

2d. It must be shown that complainant, at the time he made the representation, was fully aware that Pierce was about to purchase the note, upon the faith of it.

Until the person interrogated is informed of the purpose of the inquiry, he is not bound to make, nor is the other party entitled to claim, a full and faithful representation. If the inquiry be prompted by idle curiosity, the person addressed may remain silent, may answer evasively, or even untruly, without incurring legal responsibility. The law, in requiring that the person interrogated shall be distinctly advised of the object for which the information is sought, intends not merely to protect the interests of him who asks, but of him who answers, the question. It intends he shall be informed that credit is about to be given, and contracts entered into, upon the faith of the representation he shall make ; in order that, being thus admonished, he may respond with deliberation, with caution, and with scrupulous regard to truth. In this requirement there is great wisdom. It proceeds upon the idea, that the citizen shall not be entrapped into a sacrifice of his rights in an unwary moment, by words which, though lightly and heedlessly spoken, may be artfully treasured up ; but that, on the contrary, if those rights are sacrificed, it shall be in a moment of consciousness, and be the result of a deliberate design, formed in the midst of solemn and prescribed warnings. It is not the naked language to which the Court look, but the intent of the party speaking.

The Court of Appeals of Kentucky, in *Casey v. Montgomery* and *Allen*, 1 Marshall, 467, has condensed the law upon this subject with great force and accuracy. "Expressions," says the learned judge, "of that sort, which may have escaped an individual in relation to his contracts or transactions of any kind,

Hamer, et al. v. Johnston, et al. Marshall v. Morton, et al.

should be cautiously received, where they are to be made the basis of liability. It is the deliberate will and intention of the person uttering words, and not their naked verbal import, that ought to subject him. In such case, the person making the representations should be apprised by the person to whom they are made, of the purpose for which they are required. They should be made deliberately, and with a consciousness on the part of the person making them, that they will be confided in by the person to whom they are made."

We may safely defy the production of a single case in which the drawer of a note, or the obligor in a bond, has been deprived of his legal rights of defence, in consequence of representations made, unless he was distinctly informed by the party applying to him for information, that the note or bond was about to be purchased on the faith of his statement. Judge Tucker, in his Commentaries, as already quoted, says : "If, before the assignee takes an assignment, he applies to the obligor, and informs him he is about to take an assignment of his bond," &c. So in the favorite case of defendant's counsel, 16 Serg. & Rawle, 18, the Court say: "It has been held, that if the assignee calls on the obligor, and informs him he is about to take an assignment of his bond, if the obligor acknowledges that it is due, without any allegation of defence," &c.

In Sugden on Vendors, 10, we are told, that if a purchaser suspects any person has a claim on the estate which he has contracted to buy, he should inquire the fact of him, at the same time stating that he intends to purchase the estate ; and if the person of whom the inquiry is made has an incumbrance on the estate, and deny it, equity would not afterwards permit him to enforce his demand against the purchaser.

The rule which holds a third person liable for assurance given in relation to the subject-matter of a contract in progress between others, supposes such person to be present at, or conusant of, the treaty in which the fraud is practised, and encouraging the purchaser either in express terms, or by silence and concealment of his own title, to proceed in the purchase. 5 Call, 471. In *Ibbotson v. Rhodes*, 2 Vernon, 554, a mortgagee being asked by the

agent of a person about to lend money on an estate, whether he had any incumbrance on the estate, answered that he had not. The Lord Keeper directed an issue at law, to try whether the agent told the mortgagee his employer was about to lend money on the estate. This issue would have been wholly superfluous, if the bare naked falsehood had been a sufficient ground for postponing the demand of the mortgagee.

In 9 Madd. 36, already cited, it was expressly adjudged, that the party concealing his right, to be bound by such concealment, must have notice, that third persons are contracting in reference to the subject-matter of such right. Until this notice reaches him, the duty of disclosure does not arise.

In 1 Bro. C. R. 357, 358, Lord Thurlow made this emphatic declaration : "This Court never binds a third person, but where there is notice of a treaty. There is no case in the books, but where the party, to whom the fraud is imputed, was conusant of the treaty in which the fraud was practised."

If the party sought to be charged, in consequence of a representation made, was not conusant of the treaty in which the fraud was practised, nor in any manner, nor for any fraudulent purpose, confederating with the person committing the fraud, he cannot be held liable. Fonbl. Eq. 137, 138, ed. 1835.

We ought not to take for a consent of the creditor to the alienation of his pledge, the knowledge which he may have of it, nor the silence which he keeps after he knows of it, or if he knows that his debtor is about selling a house, which is mortgaged to him. But in order to deprive him of his right, it is necessary that it appear by some act, that he knows what is doing to his prejudice, and that he consents to it. And a creditor does not lose his mortgage by his consent, except when it appears, evidently, that his intention is to release it, or that there be grounds to charge him with dishonesty, for not having declared his right, when he was under an obligation to do it. Domat's Civil Law, 1 vol. 364, B. 3, T. 2, sec. 15. "Now, I take it, that nothing will amount to a confirmation of a fraudulent transaction, but an act done by the party, after he has become fully aware of the fraud that has been practised. He must be aware that the act he is doing, is to have

Hamer, et al. v. Johnston, et al. Marshall v. Morton, et al.

the effect of confirming an impeachable transaction." Schoales & Lefroy, vol. 2, 486. Complainant was not aware of the fraud practised upon him by Davis, and of course could not have intended to ratify it. His representation should, therefore, not have that "effect."

Tested by this rule, so well established by reason and authority, the conduct of complainant commits him to no responsibility. Davis perpetrated a fraud upon Pierce, by selling him a note which had its origin in the grossest swindling. But was complainant, at the time he gave the assurance of payment, apprised that a treaty was going on between Davis and Pierce for the purchase of the note? Did Pierce, when he asked him if it was good, inform him that he was about to buy it? We answer in the negative. No such fact appears in the record, by averment or proof; and *de non apparentibus, et de non existentibus, eadem est lex.* Pierce, who alone testifies to this point, seems to have had but one interview with complainant, and to have asked but a single question, "was the note good, and would it be paid?" He was assured in reply, that it was good, and would be paid. This is all that appears to have transpired between them. No explanations were made on either side. Had complainant been approached in the manner required by law, had he been distinctly informed of the object of Pierce in making the inquiry, how different might have been his response! Instead of answering flippantly and carelessly, what he probably considered an idle, if not an impertinent interrogatory, he might have paused, reflected, reviewed the whole transaction, advised Pierce of the consideration of the note, and in the spirit of caution and circumspection, which he would doubtless have felt, might have so qualified his answer as to have protected at once his own interests and those of Pierce, from the fraudulent machinations of Davis.

The record furnishes neither allegation nor proof that complainant was aware of the intention of Pierce to buy the note, or that a contract for that purpose was in progress. A representation thus made, ought not and cannot bind.

3d. It must be shown, that not merely Pierce, but that Morton,

Hamer, et al. v. Johnston, et al. Marshall v. Morton, et al.

the present holder of the note, confided in the representation made by complainant, and was induced thereby to purchase it. Fraud and damage must concur to give a right of action. 3 T. R. 51, *Pasley v. Freeman*. The party must be misled by the representation, and act under its influence, or he cannot complain. 1 Story's Eq. 212. The contract must have taken place on the faith of the representation. 1 Ves. & B. 335.

In 16 Serg. & Rawle, 18, a case relied on by defendant, the Court say : "The question is, was Ann Fox induced to purchase the bond under the representation made by Werner (obligor) that he had no defence, and that he was willing and desirous that the bond should be sold in the neighborhood ? If this should be the opinion of the jury, they will find against the obligor."

In *Cowen v. Simpson*, 1 Esp. C. 290, the defendant was held not liable for a fraudulent representation made by him, because it was shown that plaintiff had not acted upon it, but upon a similar representation made by another. 2 Starkie's Ev. title *Deceit*. All the cases, without exception, proceed upon the ground, that the drawer of the note, by his representation and assurances of payment, induced the assignee to purchase it. Unless this influence was successfully exerted, there can be no responsibility. Has Morton shown that he purchased the note on the faith of complainant's assurance to Pierce ? It is true, that this assurance was communicated to him, but this may have been done and yet the assurance not have constituted the controlling motive to the purchase. The only witness who speaks to this question is Pierce himself. Having deposed that, when about to sell the note to Morton, he stated to him complainant's assurance, "that it was good and would be paid ;" he is asked whether Morton was not influenced by that statement to buy the note ? His answer is so unique that we cannot forbear quoting its very words. "I think," says the witness, "the statement alluded to was the inducement to the taking of said note. I think he would have taken the note any how."

The witness does not undertake to make any positive declaration in relation to the motive which operated upon Morton. He

Hamer, et al. v. Johnston, et al. Marshall v. Morton, et al.

gives us his impressions; his thoughts. He thinks Morton was induced to buy by the statement, and he thinks he would have bought "any how." These thoughts are in direct conflict, and neutralize each other. It is a matter of demonstration, that if Morton would have bought the note "any how," he acted under some other influence, probably some preexisting determination, and not under the influence of the statement referred to. Perhaps he was a "shaver," a speculator in commercial paper; and perhaps complainant's note was offered to him at so tempting a discount, that his cupidity could not resist the bait. Perhaps his eagerness and resolution to buy, running all hazards, may have been manifested to Pierce, who may have availed himself of this feeling, to pass the note off "without recourse." Doubtless the feelings of Morton upon the subject were well known to Pierce, and, in full view of them, his opinion is, that the note would have been purchased without any statement as to complainant's assurances. We insist, therefore, there is no proof whatever that Morton became the holder of the note on the faith of complainant's representation. The law, however, requires that the proof to this fact should be most distinct and conclusive, because it is the *grammen* of the defence.

Even if the testimony to this point were clear and irresistible, there is no allegation in the pleadings, under which it could be received, or considered of. It is worthy of all remark, that Morton nowhere avers or intimates, that he purchased the note on the faith of complainant's representation or assurance of payment. It was obviously an all-important averment, and would doubtless have been made, could it have been done with safety, or with proper regard to truth. He well knew that he concluded the trade under other influences; and, hence, he endeavors to shelter himself under the confidence reposed, not by himself, but by Pierce, in the assurances of complainant.

In 12 Wheat. 181, Mr. Chief Justice Marshall lays down the rule contended for, in this explicit language: "That a decree must be sustained by the allegations of the parties, as well as by the proofs in the cause, is too well established to be disregarded."

In 1 Bibb, 316, it was held that evidence, to merit the attention

Hamer, et al. v. Johnston, et al. Marshall v. Morton, et al.

of the Court, must be relevant, and illustrative of some point presented by the pleadings.

It was adjudged in *Morrison's ex'e's v. Hart*, 2 Bibb, 6, 7, that "a fact not alleged, can no more in a court of equity, than in a court of law, constitute a basis upon which an adjudication may be made, it being equally true that the Chancellor, as well as the Judge, must decide according to the allegations of the proof."

It not being alleged in the answer, or in any part of the pleadings, that the purchase of the note was made by Morton, under the influence of complainant's representation, there is no issue made upon that point, and however convincing might be the testimony, it would have to be rejected as irrelevant. The decree in this cause, resting upon the assumption that there was not only averment but proof to this point, cannot be sustained.

This is not a technical or formal objection, but one supported by a rule of practice and pleading, as ancient as the common law itself.

It will, however, be conceded, we presume, that Morton did not purchase on faith of complainant's representation, and his right to a recovery will be based on the ground, that Pierce, his assignor, thus bought, and that he is entitled to Pierce's equity against complainant. Had Pierce transferred the note in the ordinary way, remaining liable as indorser, it might be urged with some plausibility, that, to make his equity available as a protection to him, it should enure to the benefit of Morton, who might, under its cover, have judgment and satisfaction of the drawer, thereby discharging Pierce from his responsibility. But the assignment is made "without recourse," and Pierce states, that he has no interest whatever in the note, or in this suit. Let the decree be for or against complainant, Pierce is saved harmless. The equity of Pierce, if it existed at all, was personal to himself; it arose out of the fact that he purchased the note, and laid out his money, because of complainant's assurances of payment. It might be against conscience for complainant to insist on a failure of consideration against Pierce, but certainly, as against Morton or others, who purchased the note without trusting to or being

Hamer, et al. v. Johnston, et al. Marshall v. Morton, et al.

influenced by these assurances, he might impeach the note with perfect propriety. For, between them and complainant, there exists no such relation as obtains between Pierce and complainant; and the equity, to which this relation could alone give rise, must be wanting. If Morton bought the note upon his own judgment, and upon his own calculation of the chances of payment and profit of the trade, unpersuaded and uncontrolled, by complainant, or his conduct, neither law nor good morals would require, that the latter should be deprived of his statutory rights of defence.

A. sells a horse to B., representing it to be sound, and B. sells the same horse to C. without any such representation. It is afterwards discovered by C. that the horse is unsound, and was so at the time of the sale by A., and that A. had knowledge of the unsoundness. Will it be contended, that C. could maintain an action against A. on this representation, not made to him, and not influencing his purchase? To state the question, is to answer it in the negative. But, to make the case more analogous to the one at bar: A. is about to sell the horse to B., but declines making any representation as to its soundness. B. inquires of C., who once owned the animal, as to its condition, and is assured that it is perfectly sound, upon the faith of which assurance, he makes the purchase. B. sells to D., who buys at his own risk, without exacting any representation of soundness. It is afterwards ascertained, that the animal is diseased, and was so when sold by A., and that C. was conscious of the fact. Upon what principle of law, or morals, could it be said that D., the dealer at arms length in the market, might have his action against C.? There would be fraud in C., but no damage to D., resulting from that fraud; for C.'s representation was not addressed to him, and did not influence his purchase. Suppose that, in each of these cases, instead of a representation, there had been a warranty, based upon a valuable consideration, and the party, to whom the warranty was made, had sold the horse without warranty. The principle would be the same, and the person buying without a warranty could not avail himself of the warranty made to others who had previously owned the property. For although covenants of warranty follow real es-

Hamer, et al. v. Johnston, et al. Marshall v. Morton, et al.

tate, the rule is different in regard to personality, because in relation to personality there is no privity of estate as there is in the case of realty. Tucker's Com. tit. *Covenant*, 124.

This principle has a manifest application to the case at bar. *Caveat emptor* is a maxim of the common law, applying most strictly to a man who buys a *chase in action*, or, in other words, a suit; and unless he has protected himself by a contract of warranty or a representation, on the faith of which he acted, he runs all hazard, and, in the event of loss, is without redress. If others, more wily and cautious, have previously owned the property, and protected themselves by such contract or representation, it is no protection to him. Tucker's Com. 336.

The statute places the holder of a promissory note in the shoes of the payee, not in the shoes of any intermediate assignee, who may have strengthened his position by some equity, peculiar and personal to himself.

For whose protection is complainant to be deprived of his rights of defence, under the statute? Pierce asks no protection; he is beyond the reach of loss, terminate this controversy as it may. Morton, a speculator in the market, buying without warranty, and influenced by no representation of complainant, is entitled to no protection, at least, at the sacrifice of one who has committed upon him no fraud, made with him no contract.

The statute authorizing the makers of commercial paper to impeach its consideration, in the hands of *bona fide* assignees, is, it is confessed, anti-commercial in its spirit, but it is eminently adapted to the habits and pursuits of the people of Mississippi, who are not merchants, but tillers of the soil. They have displayed, in this enactment, an ambition above that of "the shop-keeper," an ambition which seeks the true glory of a State, in the advancement of principle, and the interests of sound morals, rather than the miserable aims and selfish policy of mere trade. In thus worshipping at the shrine, rather of *justice*, than of mammon, they have chosen the better part, and, in despite of the bribery of their spoils, have given craft and fraud a stern and sublime rebuke. No disposition should be felt to cripple or curtail the operation of this statute, nor should the rights which it solemnly and anxiously guards,

Hamer, et al. v. Johnston, et al. Marshall v. Morton, et al.

be sacrificed to words, lightly and unconsciously uttered, and which, for aught that appears, passed by the holder of this note as the idle wind, influencing him to no contract, and visiting upon him no loss.

George S. Yerger, for defendants.

The complainants executed their several notes to Willie Davis, for lands, which he represented he purchased from the Indians, under the 14th article of the treaty of Dancing Rabbit Creek; Davis made a bond for title; but, from the evidence in the cause, it appears he never had any title. Davis, before the notes matured, assigned them to G. S. Pierce, who assigned them to defendants. The bill seeks to enjoin their collection, upon the ground of failure of consideration. The defendants prove by Pierce (who is released), that before he traded for the notes, he went to Hamer and Morton, and requested to know of them, whether they had any defence to the notes, and that they both assured him that they were good notes, and no difficulty about them, and assured him that they would pay said notes punctually, and that, in consequence of that assurance, he traded for them."

The complainants filed an amended bill, in which they admit the above statement, but allege, at the time they made it, they were not aware of the fact, that Davis had defended them. Upon these facts, the question is, whether they must pay the notes or not.

1. We insist that, although the case made out might be sufficient to enjoin the notes in the hands of Davis, yet as Pierce, before he traded for the notes, went to the complainants, and they assured him he should have no difficulty about the notes, and that they would punctually pay them, they cannot, as against him and his assignees, set up the fraud of Davis. Pierce acted on the faith of their assurance, and parted with his property on the faith of their representation. It is probable, that they were not aware of the failure of consideration at the time; but this does not alter the case; whether they knew it or not, it would be a fraud on Pierce, if they did not now pay him.

2. It is an old and settled principle, that when a man acts on the

faith of a representation made by another, that other shall make the representation good. 1 Story's Eq. 202, 203, in note.

But the precise point has been decided in several adjudged cases, in one or two of which the party did not know. Vide Bailey on Bills, 549; *Ludrick v. Crawl*, and *Carney v. Fields*, 2 Yeates's Rep. 464, 541; 1 Pennsylvania Rep. 27, 476; 16 Serg. and Rawle, 18, 21.

The case of *Pearson v. Morgan*, cited 1 Story, 203, in note, is directly in point also, to which case I refer the Court.

CHANCELLOR. The question presented in this case by the pleadings and proof for decision, is, can a maker of a promissory note, who assures one about to deal for it, when called on by the intended purchaser, to ascertain if there is any objection to the validity of the note, that it will be paid at maturity, set up any defence that might exist between himself and the original payee?

I incline to the opinion that he cannot. As between the assignee of the note and the maker, a new consideration has arisen in favor of him to whom the assurance is made. I will illustrate my meaning by a supposed case. A. verbally assumes to pay to B. a debt due by C. to B., in consideration that C. would give A. a horse; here the consideration moving between A. and B. is the horse, that C. has undertaken to give A.; a consideration with which B. has nothing personally to do, and yet which influences and controls the payment by A. So in the case before me; the makers of the notes agree with the assignee, that, in consideration of the agreement by the assignee and their creditor, they will pay the amount of their note to the assignee. The consideration of the note, as between the payee and the makers, is one thing; but the consideration, as between the assignee and the makers, a wholly different thing. It is true, the literal contract of the maker is not that which I have just detailed; but the legal effect of their contract is no other. By operation of law, the indorsement of the note is a contract between the maker and the assignee to pay the note, according to its tenor and effect; not that any actual consideration has passed between the assignee and maker, but the law transfers the original consideration to the new contract, made by the assignment. This is a contract

which the law makes in every case of indorsement; and but for our statute upon the subject, the maker of the note would be absolutely, in every such case, bound to pay its amount to an innocent assignee, without regard to the situation or condition of the original consideration. In this case, however, superadded to the original consideration, which exists in every case of indorsement, is the new consideration, arising by direct and not implied contract between the indorser and the maker. The maker has said to the indorsee, you may freely part with your property to the payee; I will pay you its value punctually. Suppose, in this case, no note had intervened and been in existence; and the maker of the note had said to Pierce, when about to trade with Davis, I owe Davis so much; you can let Davis have your property; I will pay you the amount you ask; and upon that promise, Pierce had parted with his property to Davis, and sued Hamer, in an action of assumpsit, for the value thereof; could Hamer plead, that he owed Davis nothing? or that the consideration of the contract by which he *then* expected to owe Davis, had failed, and he *now* owed him nothing? Clearly not; and yet, I apprehend, the fact, that the amount of Hamer's real or supposed indebtedness to Davis had assumed the shape of a promissory note, and was payable at a fixed and stated day, would not alter the character of the consideration between him and Pierce, or in any degree affect the nature of his obligation.

It has, I am aware, been held in Pennsylvania, that where the maker of a note has a good defence against the original obligee, and acknowledges his liability to the assignee, *after* the assignment has been made, he is, nevertheless, not bound by the acknowledgment; and the reason is obvious, because it did not enter into the consideration of the assignment to the new assignee, it formed no inducement with him to take the note, for it was made after he became the holder of it, and so far as it was evidence of any agreement at all on the part of the maker, it was a mere *nudum pactum*, without consideration, and of course not at all obligatory. But in the same State, it has been held, that if an innocent assignee is induced to take an assignment, by reason of a promise on the part of the obligor to pay the note, the taker is concluded from setting up any defence to it. See 2 Yeates's Rep. 464; 14 Serg. and Rawle, 304.

I have not been able to see the book last referred to, but the principle is thus broadly stated in Wharton's Digest, without any such qualification as that insisted on by the complainants in this case. In Virginia, where, if I recollect right, they have a similar statute to our own, it was held, in 2 Randolph, 247, that an indorsee, who purchases a negotiable note, without notice of any equity between the maker and indorsee, is not affected by such equity; especially, where the maker, before the assignment, gave assurances to the indorsee, that the note would be fully paid.

But independent of any express adjudication on the subject, I think the unconditional liability of the complainants to the defendants, upon the note, can be sustained upon general principles. Where a party represents a particular fact, upon the faith of which he induces another to deal, he is bound to make that representation good, and it is immaterial whether the party making it knew it to be true or false. The rule is extended so far, that if a party innocently misrepresents a fact by mistake, it is equally conclusive, for it operates equally as a surprise and imposition. 1 Story's Eq. 202, 203. Even ignorance of a party's rights will not excuse him, if he misleads the purchaser by his own misrepresentations, though innocently. The maxim is justly applied to him, that, where one of two innocent persons must suffer, he shall suffer, who, by his own acts, occasioned the confidence and the loss. 1 Story's Eq. 377; 3 Peere Will. 74 (Cox's note); Com. Dig. Ch. 4 W. 28; 6 Ves. 173; ib. 182, 183, 184; 1 Vernon, Rep. 136. It is a settled maxim of chancery jurisprudence, that where the equity of the parties is equal, the law must prevail, and a court of chancery will not interfere. 1 Story's Eq. 75. The equities of parties is said to be equal, where both are equally innocent, and have been equally diligent. ib. 75. Test this case by the application of these principles, and it must be at once apparent, that the maker of the note cannot, without doing violence to them all, escape from his liability to the assignee. He represented to the assignee, that he might trade for the notes with safety; such, at least, is the fair inference from his express promise to the assignees to pay them the notes at maturity, in view of the assignee's intention to trade for them. He has, then, represented that the notes were good valid and binding notes, and

Hamer, et al. v. Johnston, et al. Marshall v. Morton, et al.

he must make them so. But for his assurance, the assignee would not have taken them, and no injury would have followed; but the loss being occasioned by his acts, he must be the sufferer.

It is unnecessary to investigate the case further; the complainants cannot escape the effect of their own conduct. To permit it, would be to enable them to commit a wrong, and then profit by it. One or the other of the parties must lose the amount of the note. I think, upon any and all the grounds I have stated, the complainants must bear the loss. The injunction must, accordingly, be dissolved.

Hamberlin, et al. v. Terry, et al.

DECEMBER TERM, 1843.

HAMBERLIN, et al. v. TERRY, EXECUTOR, et al.

If the probate of a will has been obtained by fraud or surprise, the probate courts in this State have power, upon a proper showing, to vacate the probate thus irregularly obtained, examine the whole matter *de novo*, and decide accordingly.

The probate courts in this State have, under our constitution, sole jurisdiction of the subject of wills; a jurisdiction, at least, commensurate with that of the ecclesiastical courts of Great Britain; and the court of chancery has no power in this State, to decree the probate of a will void, even though charged to have been procured by fraud, such power belonging exclusively to the probate courts.

H. and others filed their bill, stating that the will of their ancestor, made in a fit of lunacy, had been probated by fraud, and praying that the Court of Chancery would set the probate aside; the will contained a clause, emancipating the slaves which remained in the hands of the executor, and also constituted a residuary legatee, who was not made a party to the bill; held, that though the Court of Chancery had no jurisdiction to set aside the probate of the will, yet that the emancipation of the slaves was a *void* bequest, and to that extent the court would have jurisdiction, if the residuary legatee had been party to the proceedings.

All personal property of a testator not disposed of, or ill disposed of, that by lapse, or void bequest for illegality, does not pass as directed by the testator, goes to the residuary legatee. A different rule prevails as to real estate.

THE bill in this case was filed by the heirs-at-law of Pickens, deceased, to set aside the probate of their ancestor's will, alleged to have been effected by fraud and surprise. The will, among other things, emancipated the slaves of the testator, and also constituted a residuary legatee, who was not made a party to the bill.

There was a general demurrer to the bill, for the want of jurisdiction in the Court, to grant the relief asked for; upon which the cause was submitted to the Court.

CHANCELLOR. The complainants sue as heirs-at-law of their deceased ancestor, and in their bill, pray, that the probate of a will made by him, may be vacated, and a trial for the establishment of the will, be ordered *de novo* in the Probate Court of Jefferson county, in which court, the probate which they seek to set aside has been effected. It is charged, that the testator was a lunatic, and, at the time of making the will, was laboring under a fit of

Hamberlin, et al. v. Terry, et al.

lunacy ; that the making of the will was obtained by surprise and fraud. The ground upon which the interposition of this Court is asked, is that of newly discovered testimony. To the bill there is a general demurrer.

That the Probate Court has the power to vacate the probate of a will, and examine the whole matter *de novo*, upon proper showing by bill or petition, I have no doubt. This power results as well from its constitutional jurisdiction, as from the analogy which its power over these matters bears to the ecclesiastical courts of England. To vacate the probate of a will, or repeal letters of administration, where the one or the other was procured through fraud, error, or mistake, is a common exercise of power with the spiritual or ecclesiastical courts in England, having jurisdiction over testamentary matters. See 1st vol. Eccles. Rep. 44, ib. 357, ib. 425 ; Toller's Law Exec. 72; 1 P. Wms. 42, 43 ; *Blackburgh v. Davis*, Toller's Exec. 120 ; 4 Serg. and Rawle, 201.

It would seem, that our courts of probate have jurisdiction over testamentary matters commensurate, at least, with the ecclesiastical courts of England. The Supreme Court of this State has held, that they have by the constitution not only original, but full and exclusive jurisdiction over testamentary matters, and that it would be incompetent for the legislature to give that jurisdiction to any other tribunal. *Carmichael v. Browder*, 3 Howard, 352. The probate of wills, as to both real and personal estate, in this State, belongs exclusively to the courts of probate ; from whence, it would seem to follow, that if a probate of a will has been granted, although it may have been obtained by fraud, or the testator have been insane, the Probate Court alone can revoke it ; this is clearly the rule in England. 2 Vernon, 8 ; 1 P. Wms. 388 ; *Plume v. Beal*, 2 Vernon, 76 ; 3 Bro. P. C. 358 ; 1 Ves. jun. 287 ; Amb. 756.

I am aware, that in the case of *Barnsley v. Powell*, 1 Ves. jun. 119 - 284, Lord Chancellor Hardwicke decreed a party, who had procured a will by fraud, to consent to the repeal of the probate. But this is an isolated case, and does not seem to have been generally followed. Upon the authority of this case, I find two decisions of like character, made by the Chancery Court of South Carolina, and directing a reëxamination before the Probate

Hamberlin, et al. v. Terry, et al.

Court. 2 Desaus. 313, 342. In both these cases, the Court and counsel seem to have overlooked the question,— whether the power of vacating the probate of a bill and of examining the matters *de novo*, might not be exercised, and whether it did not properly belong to the jurisdiction granting it.

There is one ground taken by the bill in this case, which demands notice. That provision of the will which seeks to emancipate some slaves and gives them a pecuniary legacy, is clearly void, under the laws of this State upon that subject. The executor is, it is charged, in possession of them under the will; this feature would seem, at first, to give jurisdiction to the extent of the void bequest or legacy. But upon examining the will, it is found to contain a residuary bequest to the defendants, A. and M. Gupton. This provision excludes the complainants from all claim whatever, under the void bequest. The law is now well settled, that a residuary bequest carries not only everything not disposed of, but everything ill disposed of, and everything that in the event turns out not to be disposed of, whether by a partial revocation of a will, a lapse, or by a gift being void for illegality. 1 Ves. sen. 320; Roper on Legacies, 453; 2 Merivale, 392.

In relation to real estate the rule is different, a void devise passes to the heirs, and not to the residuary devisee.

The demurrer must be sustained, and the bill dismissed at complainants' costs.

Patterson v. Denton.

JULY TERM, 1840.

ANDREW PATTERSON v. GABRIEL DENTON.

A sheriff's return, that he took a forthcoming bond, which was forfeited, is not conclusive evidence of the fact, but may be impeached collaterally, in a proceeding to which the sheriff is not a party.

A forthcoming bond, for the delivery of property taken in execution, signed in blank, and afterwards filled up by the sheriff, without authority, is void ; and a court of chancery will decree such a bond to be cancelled.

SEVERAL cases were submitted to the Chancellor at the same time, involving the same questions of law and fact ; the statement of the facts of one case will be sufficient.

The complainant filed his bill, stating, that Malachi B. Hamer, Frederick Stanton, and Henry S. Buckner, obtained judgment at law, in the Circuit Court of Yazoo county, against Lineas B. Markham, and Vincent Galloway, for \$329, in May, 1838. That an execution issued thereon to November, 1838 : that in the latter part of 1838, Markham called upon the complainant with a forthcoming bond, being the printed form, without the blanks being filled up, for the delivery of property purporting to have been taken in execution, and asked the complainant to sign the same, promising, that Vincent Galloway and W. K. Stone would unite with him in the execution of the bond ; that the complainant accordingly signed it with the express agreement, that Galloway and Stone were to become co-sureties therein ; that the condition of the bond, and the property stated to have been levied upon, were inserted in the bond after the complainant's signature and delivery to Markham ; that all the blanks, including the amount of the penalty and of the judgment, were subsequently filled up by the sheriff ; that the complainant never redelivered it, or authorized it to be thus filled up ; that Galloway and Stone never signed it ; that it was not his bond ; that Markham gave it to the sheriff, who returned it forfeited ; that an execution had issued on the bond thus forfeited, and had been placed in the hands of the sheriff, who threat-

Patterson v. Denton.

ened to levy. The prayer of the bill was framed in accordance with the allegations.

The answers were made demurrers to the bill, and they also denied all knowledge of the facts charged, and called for proof, which was taken, and substantially verified the allegations of the bill.

G. S. Yerger, for complainant.

1. The law is, as we consider it, settled, in relation to bonds and other sealed instruments. That a mere signing and sealing in blank, is not sufficient to make it a bond, Sheppard's Touchstone; 2 Brock. Rep. 64; 4 Rand. Rep. 196, 448; 1 Wash. 73; 1 Hill's So. Car. Rep. 267; 2 Dev. N. Car. Rep. 374; 2 Dev. and Bat. Rep. 381; 6 Gill and Johns. 250; 5 Mon. Rep. 25; 3 Bibb, 361; 1 Yerger's Rep. 69, 149; Ohio Con. Rep. 167.

All the above cases decide the precise point, but I refer the Court particularly to the case in 2 Dev. and Battle, which examines the cases relied on, on the other side; and also to Mr. Ch. J. Marshall's reasoning in the case in 2 Brock. and 6 Gill and Johns.

2. It is admitted that some of the authorities decide, that when express authority is given at the time, to an agent, to fill it up, and it is filled up, in conformity with the authority, that it is good. 8 Cow. 118, and case there cited from Anstruther's Rep.; 6 Serg. and Rawle, 308; 17 Serg. and Rawle, 438; 2 American Com. Law, 408. These authorities are repudiated as unsound, in the above cases.

But admitting these authorities to be law (which they clearly are not, as they are opposed by the principles of the common law, and by the cases first cited), still, in the case before the Court, no authority whatever was given, as the plea alleges, and which the demurrer admits to be true.

But I insist, upon principle, they are not sustained; they are all bottomed or founded on Lord Mansfield's decision or dictum, in *Texira v. Evans*, cited in 8 Cow. 118, from Anstruther's Rep.

It is admitted in all the cases, that the mere sealing a paper in blank, and delivering it for the purpose of filling it up, does not make it a bond. The party must do some further act, he must redeliver

Patterson v. Denton.

it as his bond, after the writing is filled up. But it is insisted, that he need not do this in person ; that he may depute or authorize another to do it for him. This is certainly the law. In order to make it his bond, he may authorize another to fill it up and deliver it. But the question is, can he do this by parol ? Can the act of another bind him in a bond, unless he have authority by seal to do so ? We think the principles of the common law are manifest that he cannot.

Suppose A. authorizes B. by parol, to seal and sign a bond, and he does it, is B. bound ? Surely not. Suppose A. seal and sign a blank, which all admit is null and void, and authorize B. by parol, to fill it up and deliver it, is it binding ? Surely not. In both cases it is the act of an agent, constituted by parol.

The authorities are clear, that an agent, to bind his principal by bond, must have authority under seal. 9 Wend. Rep. 1 Com. Dig. 777.

But it is supposed that the act of one partner sealing a deed in the partnership name, in the presence of another, is an authority to show the authority may be by parol. Not so. By the common law, A. may stand by and direct B. to seal a deed for him, and he may adopt B.'s seal, and it is his act. 4 Tenn. Rep. 313. So when he is constructively present, and knows what his partner is doing, although, at the moment the seal is affixed, he is not present, but is in the room. 9 Johns. Rep. 285, *Mackey v. Bloodgood*.

But it is said the sheriff's return, that the bond was executed, is conclusive. The act of assembly, authorizing the sheriff to take the forthcoming bond, does not constitute him the judge of its validity. His act, in receiving the bond, does not constitute him a judge. If the bond is forged, the return of the sheriff cannot make it valid. As between the parties to the immediate proceeding, the return of the sheriff as to process is conclusive ; but it would be absurd to say his return, that the bonds or other deeds were executed, should conclude a party, who, perhaps, as in cases of forgery, never heard of them.

But the return of a sheriff is only conclusive against a party,—the surety is no party, until he executes the bond ; it is his own act that is to make him a party. If he never executed it, he never was

Patterson v. Denton.

a party. He is a mere stranger to the original proceeding, and the law is settled, that the return at most is but *prima facie* evidence against third persons. Watson on Sheriff, 72 ; 11 East, 297 ; 4 Conn. Rep. 60 ; 4 Greenleaf, 230 ; 3 Rand. 554. See also the opinion of Chancellor Buckner on this point.

4. But if the law had said in express terms, that it should be binding and conclusive, which it has not, it would be wholly unconstitutional. A party, by the common law, who is charged by bond, has a right to a trial by jury, to ascertain whether it is his bond or not. The execution of the bond is a fact purely for a jury, if the party asks it. The legislature cannot deprive him of this right, by saying the return of the sheriff shall conclude him. It is expressly on the ground, that the legislature did not intend to take from the parties the right of trial by jury, that the constitutionality of the acts, allowing forthcoming bonds, is sustained — i. e. he may have an issue, if he chooses, or go into equity for relief. 4 Peters' Cond. Rep. 440, 445 ; *Smith v. Smith*, 1 How. Rep. 102. The point, that the return is not conclusive, has been explicitly decided in 2 Leigh's Rep. 157 ; 4 Dana, 153. The party has the right to supersede the execution, and have an issue. 1 Dunlap's Prac. 368 ; 2 Johns. Cases, 260, 261 ; or, as in the above cases in Leigh and Dana, he might file a bill ; the jurisdiction is concurrent.

Fitch and Brown, for the defendants.

CHANCELLOR. It is insisted upon the part of the defendants in these cases : 1. That the remedy of the complainants is at law. 2. That the sheriff's return of "bond forfeited," is conclusive evidence of the due execution and delivery of the bond, and can be impeached only by a direct proceeding, to which the sheriff must be a party. I shall examine the latter point first : If the proposition be true, that a sheriff's return is conclusive, it can only be so in relation to those facts which the law requires him to return, and not beyond this. It certainly cannot be conclusive of any and every fact that he may choose to embody in it. It becomes then material to inquire, what facts the sheriff is required by law to return. They are to be found declared in the statute, How. and Hutch. 634 ; and the facts which he must return in such a case as

Patterson v. Denton.

this, are, that he has levied the execution ; that a forthcoming bond was taken, and that bond was forfeited ; this is the extent of the return he is authorized and required to make. It will be seen, at once, that with the execution of the bond itself he has nothing to do, in his return. The law does not call upon him to say one word upon that subject. A return by him on any instrument of writing that might legitimately come into his hands, or upon process of the manner in which he has served the same, is a very different thing from the instrument or process itself, upon which the service has been effected ; and would not preclude a party from showing that the process, or instrument of writing, was void on its face, or by reason of facts arising *aliunde*.

It is insisted, that because it is the sheriff's duty to take a forthcoming bond, the return that he has taken it, and that it was forfeited, is conclusive. It may be replied, that it is also his duty not only to take it, but to take it in conformity with law. If the return, then, that it *was taken* be conclusive of that fact, it must for the same reason be equally conclusive of the other, and yet such a conclusion would scarcely be insisted on ; for surely it might be quashed for non-conformity with the law. The return then is mere evidence of the taking, and not of the manner of taking or executing the bond. This then is not a proceeding to contradict a return. It may be admitted that the bond was taken, but the manner of the taking may be questioned without the denial of the other. To illustrate my meaning, I will put a case. Suppose a minor, or person *non compos mentis*, were to become a surety on a forthcoming bond, and that bond to be returned forfeited, would such return be conclusive of their liabilities ? or would it not, only be conclusive of the isolated fact of taking the bond, and that the property mentioned in it was not delivered on the day and at the place appointed ? This it is presumed is the only extent such a return could have. If an action of trespass *de bonis asportatis* be instituted against the sheriff, where the property which he had returned "levied upon," had been left with the plaintiff, would the sheriff's return, that he had "levied" be conclusive against him ? The rule itself, that a sheriff's return is conclusive, and cannot be collaterally contradicted, is one of public policy, and should yield to

Patterson v. Denton.

such modifications as that policy suggests. It rests, as I presume, upon the credit and sanctity which the law gives to the acts of its own officers. It is a rule of evidence, and one in derogation of the general law of evidence, which guarantees to a party the right of examining and sifting whatever is offered in evidence against him. It is one, therefore, which should rather be restricted than extended in its application.

But it is said the sheriff's return cannot be questioned except in a proceeding for that purpose, and to which he is made a party. Suppose the complainant had had a day in a court of law upon this bond, might he not have moved to quash it for errors apparent upon its face, and that upon mere motion, without notice to the sheriff? Such is the daily practice. Might he not have pleaded *non est factum* to the bond, and have given the very facts stated in this bill, as evidence upon the trial? or must he have been driven to the necessity of first bringing his action against the sheriff for a false return, and have had that return actually falsified by the verdict of a jury, before he could have resisted the enforcement of the bond? It is believed, that no such step would be necessary. Will a court of chancery narrow his ground, restrict his rights, and throw burdens upon his remedy here, which would not have encumbered it at law? Such a course would be contrary to the very elements which constituted the existence of this Court. I can have no doubt of the power of this Court to inquire into the truth of the sheriff's return, without his being a party to that inquiry.

2. Upon the question of jurisdiction, or that the remedy of the complainants is at law, apart from the general rule, that a court of equity will relieve where a party has no remedy or a doubtful and inadequate one at law, it will be seen, that the case reported in 2 Leigh, 157, deciding an appeal from the Court of Chancery, is directly in point. It was a case where a forthcoming bond had been delivered by a surety as an escrow, upon condition that others should also sign it, which was not done; and that court held, that the facts amounting to proof of *non est factum*, the party should not be held liable in equity beyond what would have been his liability at law. The ground in that case for going into chancery was, that he had no notice of the motion for execution, and could not,

Patterson v. Denton.

therefore, have availed himself of the defence. In Virginia, the statute regulating the forfeiture of forthcoming bonds, and the judgment rendered thereon, differs from ours. There, judgment on the bond can only be rendered upon notice duly served upon the parties to the bond ; while here, the forfeiture of the bond is made by operation of law an immediate and operative judgment against the obligors in the bond, upon which execution may immediately issue, and proceedings be instantly had thereon. With us, no notice to the parties is necessary. And yet, in the case to which I have referred, it was not even hinted at, that the sheriff's return of having taken the bond precluded all inquiry, or barred the defence.

In *M'Nutt v. Wilcox and Fearne* (3 How. 417), the Court of Errors and Appeals of this State, have decided, that a writ of error, *coram nobis*, would not lie from a judgment or a forfeited forthcoming bond. And I apprehend, that a motion to quash, would be confined to defects apparent upon the face of the bond ; the party could not, as I believe, upon such motion, present an issue of facts, which could only be tried by a jury. In what other mode, then, can a party circumstanced like the complainants in these cases, obtain that relief to which they are, without question, entitled, except that which they have sought through this Court ? Independent then of all other grounds for taking jurisdiction of the case, and giving that decree which its circumstances demand, if all these were wanting, I should not hesitate, upon that familiar branch of equity jurisdiction, which decrees bonds or other instruments which are void, or which have been fraudulently obtained, and where the defence might be difficult or uncertain at law, to be delivered up and cancelled, to grant the decrees asked for in these cases.

Let decrees be prepared according to the prayers of the respective bills.

Neibert's Adm'rs v. Withers.

DECEMBER TERM, 1840.

J. NEIBERT'S ADMINISTRATORS v. S. B. WITHERS.

Where a judgment has been obtained against the representatives of a deceased person, and the estate of the deceased has been represented insolvent to the Probate Court, it is irregular under the statute (How & H. 410), to sue out an execution upon such judgment against the estate, and a court of chancery will enjoin it.

Where the administrators have represented their intestate's estate insolvent, and have filed a bill to enjoin an execution, upon a judgment at law, obtained since the representation, it is no answer to the bill, that the representation of insolvency was procured by fraud, or that the administrators had improperly managed and used the estate.

It is not necessary, before an estate of a deceased person can be declared insolvent, that the real and personal estate of the deceased should be sold and reduced to money; it is sufficient, if the administrator or executor, from a comparison of the probable value of the real and personal estate, with the debts, shall deem the estate insolvent, and so represent it.

THE bill, in this case, states, that complainants are administrators of J. Neibert, deceased, and at the last February term of the Probate Court of Adams county, they represented said estate insolvent, and commissioners to audit claims were appointed by said Court. A copy of the proceedings in said Court are exhibited with the bill. It states, that no order of the sale of the real estate was then made, and none can now be made, owing to the absence of the Judge of said Court; but complainants would have such order made so soon as it could be legally done; at least, as soon as the cotton crop then growing could be gathered — said estate consisting in part of a valuable cotton plantation, in Washington county.

It declares their belief, that the whole of said estate, both real and personal, will be insufficient to pay off the claims against said estate: that the defendant obtained a judgment in Adams Circuit Court against complainants, as administrators of said J. Neibert, deceased, before said estate was represented insolvent, for \$1539.74 and costs, on a common debt of said estate, not privileged: that a *fi. fa.* hath been issued thereon to Washington county, and the bill exhibited a transcript of the judgment and the proceedings: that defendant was seeking to enforce said execution, and that slaves,

600 SUPERIOR COURT OF CHANCERY.

Neibert's Adm'r's v. Withers.

now on said estate engaged in picking cotton, would be taken and sold, unless restrained, to the injury of the estate, and other creditors, and prays perpetual injunction, and general relief.

The answer of Withers states, that he does not admit that said complainants were obliged to represent the estate of Neibert insolvent, as the bill alleges : does not admit that any such representation of insolvency was made, or that such report has been allowed or commissioners appointed, as Exhibit A of the bill is not filed. [This exhibit was afterwards filed, before the hearing of the motion.] That if such proceedings took place, it was in fraud by the complainants, and negligence by the Court : avers that complainants have received three years' proceeds of said estate, say \$80,000, which they have appropriated, in part, to the payment of such debts as they pleased, without regard to legality. And this, notwithstanding numerous claims have been presented and suits brought against them which they have utterly failed to pay, or turn any part of the estate into money to pay : that they have always, and do still, use the whole estate, worth \$250,000, as their own property in all things, notwithstanding such pretended report of insolvency.

The answer further states, that complainants have never applied to the Probate Court for leave to sell any part of said estate to pay debts, &c.: charges, that such report of insolvency is fraudulent and void, and avers, positively, that said estate is not insolvent : that the securities in the administration-bond of complainants have become utterly insolvent since the execution thereof ; that Neibert, in his lifetime, was indebted on bills and notes to the extent of \$50,000, on which there were numerous accommodation indorsers, who are now sued, and will be compelled to pay said notes, if said report of insolvency is held good. Expressly charges, that said pretended report of insolvency was made to hinder and delay creditors, and not to administer lawfully said estate.

It admits, the probate Judge was absent a part of last summer, but denies that complainants should be permitted to receive to their own use another crop of cotton : admits the recovery of judgment by the respondent, the issuance of execution, and directions to the sheriff to levy the same : denies, that the bill shows a legal report or declaration of insolvency, and asserts, that the bill and this answer

Neibert's Adm'r's v. Withers.

show a case over which the Probate Court had no jurisdiction, and relies on this by way of demurrer.

The Exhibit A, of the bill, contained a certified copy of the proceedings in the Probate Court of Adams county, and showed that the estate of Neibert had been represented insolvent to that Court, and that commissioners of insolvency had been appointed, before the real estate had been ordered to be sold.

Montgomery, and Boyd, for motion.

The bill itself does not show a case within the jurisdiction of the Orphans' Court. That Court has no general power to allow or declare an insolvency against decedents' estates : the power is only to declare particular estates, or estates in a particular condition, to be insolvent ; and their records must show this condition, or there is a want of jurisdiction apparent. So, the same tribunal has not authority to grant letters of administration generally, but only upon the estates of decedents, and unless their records show the fact which places the estate within their control, they have no such control. It is true, it may afterwards be shown that their judgment in the particular case was wrong, but if the record does not show this, and has a case upon its face, no matter how false, within the jurisdiction of the Court, then there can be no question made against the record.

The distinctions are clearly taken and strongly illustrated by Judge Marshall, in 8 Cranch, 21 ; also, 6 Wheat. 128 ; 9 Pick. 259 ; 2 Peters, 164 ; 1 Hayw. 414 ; 1 Cooke, 194, 268 ; 1 Willes, 199 ; 1 Saund. 313 ; 1 Strange, 703 ; 2 ib. 102 ; ib. 996 ; 1 Burr. 620 ; 2 Willes, 382 ; 1 How. 173, 174.

Had the Orphans' Court, then, jurisdiction of the subject-matter of the insolvency of the estate of Neibert, according to the allegations and exhibits of the bill ? They had not, unless the record shows a condition of the estate which is the foundation of that jurisdiction, any more than they would have a right to grant letters of administration without proof apparent of the decease.

The record, then, does not show such a case. This will be manifest on looking to the Orphans' Court act.

By the 98th section it is provided, that when the administrator

Neibert's *Adm'r's v. Withers.*

shall discover or believe that the personal estate is not sufficient to pay the debts, &c., a citation shall issue for all persons to show cause why all or part of the real estate should not be sold.

By the 99th section, if the Court shall find that the personal estate is not sufficient, then said Court shall order the whole or part of the land sold.

It may be here remarked, that the whole scope of the act, so far as it relates to the payment of debts, contemplates the exhaustion of the personality first, and before the real estate is touched. And on the above examination by the Court, if the personal estate appeared sufficient, the order of sale would only go to the personal estate. Indeed, it could never be ascertained, without turning it into money, whether it would or would not cover all claims.

But, further, the 103d section of the act would serve to remove all doubt. The order of its different sentences is not very exact, but the substance is easily deduced.

It shows clearly that the intention was, that the whole estate should be turned to money, before the report of insolvency could be made; or, in other words, this was the legal ascertainment of the fact of insolvency, when the debts outbalanced the proceeds of the sale of real and personal property of the decedent. It was this deficit alone which gave a subject-matter for the action of the Court. Thus, it begins by saying, that when "the estate, real and personal, shall be insolvent," &c. "the said estate, real and personal, shall be distributed to and among all the creditors," &c. &c. This clearly means, when the proceeds of the sales before directed are insufficient to pay the debts; for it will be observed, that the word distributed, in reference to creditors, is applied to the "estate, real and personal," which can only mean the proceeds of the estate, real and personal. This is abundantly manifest, from a sentence in the same section, about midway of it, which requires "the Court to order the residue and remainder of the estate, both real and personal (the real being sold, according to law), to be paid and distributed to and among the creditors," &c.

Again. By the same section, before the estate can be in a condition for the action of the Probate Court, an account, in reference to the real estate, like that provided for in the 98th section, in ref-

Neibert's Adm'r's v. Withers.

erence to the personal estate, is to be exhibited to the Court. Now such account can never be made out, till after a sale of the lands. The reason is stronger in regard to land, than personal estate, because the appraisement would give the Court some rule as to the value of the last, but none as to the first.

This account being submitted to the Probate Court, if it appear, on striking a balance (after the lands have been ordered to sale, as aforesaid), on all the information furnished by the proceedings under the 98th and 99th sections, that the estate is insolvent, then commissioners are to be appointed, and the legal insolvency is fixed. And till these facts concur, there is no subject-matter for the action of the Court; there is no case of insolvency before them.

After the appointment of commissioners, there can be no further sales of property, and it only remains to be distributed; and wherever, in this section, the distribution is hinted at, it is also reiterated that the real estate must first be sold.

From this hasty and imperfect view, it would follow, as a necessary consequence, that if a judgment-creditor can find property, real or personal, on which to levy an execution, after any supposed representation of insolvency, that such insolvency did not exist, and that any judgment or decree, declaring insolvency under such circumstances, must be fraudulent and void. (Vide last part 103d section Probate Act.

If this be not the case, the creditor is without remedy. He cannot coerce a sale, nor can the Court make any further orders of sale. His execution is tied up, and cannot be levied. He can get no nearer to a recovery of his debt, by proving his claim before commissioners, for there will be no money on hand to pay him, and the Court can decree no distribution or payment, till the real and personal estate is reduced to money, which will never be, unless done before the declaration of insolvency.

The case before the Court is a full illustration of these views. Here is an estate yielding in three years \$80,000; not an article of this estate, real or personal, has been sold and applied to the payment of debts. The administrators have received, used, and enjoyed the income as they pleased. The whole property remains in their hands, in defiance of law. Execution creditors, who are ready

Neibert's Adm'r's v. Withers.

to levy their process, are enjoined, and the accommodation indorsers are sued to the amount of \$50,000, for Neibert's debts, which they will be compelled to pay, and then seek their redress by the vain mockery of proving their claims before commissioners, while the estate remains in kind, and not capable of distribution to them, and the administrators and securities utterly insolvent, even if a recovery could be had against them.

Independent of this, it is averred in the answer, that the estate is not insolvent, that it never has been so represented, that any pretended representation was made in fraud, and with the express view of hindering and delaying creditors. Under this aspect of the case, where is the equity on which the injunction can rest? None is perceived, none can exist.

I leave the case on these grounds, although, if not so well fortified as I believe my positions to be, I would question, with much confidence, the position, that a declaration of insolvency, after judgment recovered, will stay the execution or levy of process. There is no such express provision, and the case is not one permitting any equitable constructions or interpretations.

Quitman, and M'Murran, for complainants.

The answer sets up, in objection to the injunction,

1. Delay, in the representation of insolvency.
2. Receipt by the administrators of a large amount of assets, and appropriating them to such debts as they pleased, without regard to law.
3. Using the estate as their own.
4. That the report of insolvency is fraudulent, and that the estate is not insolvent.
5. That the sureties in administrator's bond are insolvent.
6. That accommodation indorsers of Neibert may be injured by being sued, and compelled to pay debts.
7. That said pretended report was made to hinder and delay creditors.
8. That the bill does not show a legal report or declaration of insolvency.

The 2d, 3d, 4th, 5th, 6th, and 7th objections, are distinct mat-

ters of avoidance, unsupported by proof, and the facts therein stated cannot be admitted on this motion. The 1st and 8th refer to the bill, and, so far as they can be sustained by its allegations, are admitted.

The record exhibited Ex. A, contains sufficient to show that the estate was represented insolvent, and that the Probate Court proceeded to consider it such by the appointment of commissioners to receive and audit claims. If the proceeding of that Court was erroneous, the defendant may be heard on application to reverse it; but while it remains unreversed, this Court will not inquire into it collaterally.

The question here is, Has this estate been rendered insolvent? The bill both alleges that it has been so represented, and that it is so. The exhibit shows such representation and finding. The statute, How. & Hutch. L. p. 410, declares, "nor shall any action or suit be commenced or sustained against him (administrator) after the estate, &c. be represented insolvent."

It is not necessary that the estate should be proven to be insolvent: it is sufficient that it should be so represented, and that representation need only be on the belief of the administrator.

The words, *shall not be sustained*, imply a prohibition to take any steps after judgment, as well as before.

The object of the laws upon this subject is clear and explicit. So soon as there be made a representation of insufficiency, even before the fact be found, all proceedings against the estate must at once cease: the estate must be liquidated, and creditors paid *pro rata*. The Probate Court is open to them; they will there be heard, and there alone, to prefer and urge their claims.

Equity will aid an equal distribution of the assets, and not permit one creditor to be preferred. The time for representing an estate insolvent, is wisely not limited; it may be done at any time. The administrator may not know the liabilities of the estate; obligations on warranties, indorsements, and other contingent engagements, may unexpectedly change the condition of an estate years after administration has commenced.

Suppose, even, that administrators waste an estate, would their misconduct be visited on creditors? Would their waste justify one creditor to sweep away the estate that remained, to the prejudice of others?

Neibert's Adm'r's v. Withers.

If the matters in avoidance in defendant's answer were admissible as facts in this motion, they amount only to complaints of being delayed in his selfish attempt to appropriate more than his share of the proceeds of this estate. But if it has been so badly managed and wasted — and, from his positive and perilous oath about the condition of the estate, it would seem he was very well acquainted with the proceedings thereon — why did he not cite the administrators, to account in the Probate Court? If their security was insufficient, why not remove them, or force better? The Probate Court is open; a creditor will there be heard: it is the proper and the only forum for adjusting these matters. The Chancellor will readily perceive the utter confusion in which estates represented insolvent would be, if creditors could thus proceed.

We conclude, that the case is sufficiently made out to continue this injunction. If the party, on final hearing, should prove the solvency of the estate, the plaintiffs will most happily pay his claim, and, by their counsel, sincerely hope that such may be the fortunate result of the sales of the estate.

Administrators are considered by this Court trustees, and as such will be heard, though possibly a *supersedeas* might lie at law. The answer, however, does not permit a defence on this point, and we therefore forbear to discuss it. 2 Paige, 509; *Grandin v. Le Roy*, 4 Cow. 717.

CHANCELLOR. The only allegation of the bill which I deem it necessary to notice, in this motion, is the one, that the estate of Neibert has been represented by the administrators, to the Probate Court, to be insolvent. This is averred by the bill, is proved by the exhibit, and is not denied by the answer. I do not deem it essential to the inquiry upon this motion, to investigate the history of the proceedings of the administrators, beyond the point of the representation of the insolvency of the estate. The record presented with the bill is defective; the order, appointing the commissioners of insolvency, is erroneous, if not absolutely void; yet, defective as the record is, it is sufficient to show that there has been a representation of insolvency, and to that extent the proceedings in the Probate Court seem to have been regular enough. Does such

Neibert's Adm'r's v. Withers.

a representation inhibit the enforcement of a judgment against the estate, rendered prior to that representation, is the point presented for my decision. This question involves a construction of several sections of the probate law, regulating the administration of insolvent estates.

It is provided by the statute (How. and Hutch. 409, sec. 80); that when the estate, both real and personal, shall be insolvent, or insufficient to pay all just debts which the deceased owed, the executor or administrator is required to exhibit, before any debts are paid to any creditor, except privileged debts, an account and statement of the situation of the estate, including lands, tenements, &c. of the testator or intestate; and if, thereupon, it appears to the Orphans' Court, that the estate is insolvent, then the Court, after ordering sale of the lands, tenements, &c., is required to appoint commissioners, to receive and audit claims against the deceased; and, upon report by them, the Court must order the executor or administrator to pay the proceeds, *pro rata*, to the creditors who are reported such by the commissioners. The same section of the statute provides, that no suit or action shall be commenced or sustained, against the executor or administrator after the estate of the testator or intestate is represented insolvent; by the 98th section of the same act (How. and Hutch. 415) it is further provided, that a suit already brought, or pending, may be prosecuted to judgment, notwithstanding the representation of insolvency, but that no execution shall issue, and that the claim must be filed with the commissioners.

The bill expressly charges, and shows by its exhibits, that the representation of the insolvency of the estate has been formally made to the proper tribunal, and prays that an execution, upon a judgment against the administrators, which the defendant is pressing against the estate, may be enjoined. The matters set up by the defendant, in avoidance of this charge, and in answer to it, call upon me to give a construction to the various acts upon the subject.

1. It is, in the first place, strenuously urged by the defendant, that no *legal* representation of insolvency has been made in this case; and it is insisted, that the record discloses a want of power in the Probate Court, under the statute, and in the present condition of the

688 SUPERIOR COURT OF CHANCERY.

Neibert's Adm'r's v. Withers.

estate, to entertain such a representation ; because, it is said, that such a representation can only be made when there has been a sale of the estate, both real and personal, of the deceased, and it has been reduced to money, and the executor or administrator, from a comparison of the proceeds of the sales with the debts of the testator or intestate, can safely represent, whether the estate is insolvent or not. It is attempted to sustain this view of the statute, by a reference to its language, which declares, that when the "estate, real and personal, shall be insolvent," &c. ; and which also orders, that "the residue of the estate, real and personal, after paying funeral expenses," &c. "shall be distributed," &c. ; the inference being thence drawn, that, inasmuch as it was clearly the intention and contemplation of the act, that the entire estate, both real and personal, should be sold and reduced to money, before the *pro rata* distribution required could take place, so also it was equally its intention and requisition, that it should be so reduced, before the estate could be known, and so represented, to be insolvent. The position is not a tenable one. It must be at once apparent, upon taking the whole statute together, that the representation of insolvency, upon which all proceedings against the estate were to cease, must, or at least, may take place before a sale. The statute is express, that if it appear to the Orphans' Court that the estate is insolvent, it shall proceed, after ordering a sale of the lands, &c., to appoint commissioners to effect distribution. It is clear, then, that the insolvency of the real and personal estate, spoken of in the first part of the section, is not an insolvency, ascertained beyond question, by a direct comparison of the cash proceeds of the real and personal estate, reduced to money; because, when this insolvency has been made to appear to the Orphans' Court, they are directed to order a sale of the realty, which, upon the construction contended for, must already have been effected, and the proceeds reduced into the possession of the executor or administrator. Such a construction as that contended for, is not only repugnant to the tenor and words of the statute, but would destroy and render of no effect all its provisions. Long before the estate, under the slow process of administrator's and executor's sales, could be reduced to money, judgment and executions thereon against the administrator or executor, which there

Neibert's Adm'r's v. Withers.

would have been no power to stay or resist, would have swept away the personal estate, and perhaps have rendered an estate wholly insolvent, that might, under the more guarded and restricted mode, provided by a proper construction of the act, have yielded a large dividend. I cannot sanction a construction so subversive of the very object of the law. The power of the Probate Court, in regard to all matters regulating insolvent estates, is necessarily one involving great discretion in the probate judge. If that discretion be exercised improvidently or injuriously, and it be made to appear so in the record, there is a tribunal with ample power to correct it. I cannot doubt, that where, from a fair estimate of the value of the entire estate of the deceased, the administrator or executor is satisfied that it is (both real and personal) "insufficient to pay all just debts which the deceased owed," that, acting under the solemn responsibilities of an oath, faithfully to discharge his duties to the estate, he is bound to represent the condition of the estate to the Probate Court, for its action. Upon that representation, the court must act, and if satisfied that the entire estate is insolvent, must proceed to order sales of the realty; but it is not necessary to wait for that order of the Court, before the representative of the deceased can check any attempts, on the part of any creditor, to force out of the estate an undue portion, to be applied to his debt. For the statute is equally explicit, that, upon the representation of insolvency, no action or suit shall be commenced or sustained against him. Such a representation, in full compliance with the words and spirit of the act, has been made in this case; is the defendant commencing or sustaining an action or suit against him?

2. This brings me to the second position, that I shall notice, taken by the defendant. That is, that a judgment rendered before the representation of insolvency, is not within the words or purview of the act, and is therefore not embraced by it. I think this position equally untenable with the other. I can discover no reason, nor is any suggested, why there should be a distinction drawn between judgments before and after the representation. They are both equally destructive to the object of the law, viz. a general and equal distribution among all creditors of the deceased, in proportion to their respective claims, of all the property of the deceased; and

Neibert's Adm'r's v. Withers.

this object is no less frustrated by a sale of a portion of the property under a prior, than it would be by a sale under a subsequent, judgment. Independent, however, of these considerations, I think that the statute does in terms, as well as spirit, embrace judgments before the representation of insolvency. Its language is:—"No action or suit shall be commenced or sustained against him after the estate of the testator or intestate be represented insolvent." What is meant by, "shall be sustained?" To what does it refer, if not to suits then pending, either in judgment, or not yet reduced to that condition? And surely it cannot be said, that it will not be sustaining an action or suit against the administrators in this case, if an execution upon a judgment is permitted to be levied upon the negroes, and they sold, to the utter destruction of the estate. It is clear, then, to my mind, that this portion of the statute applies to and embraces a case like the one before me.

3. It is charged in the answer, and relied upon in the argument, somewhat, that the representation of insolvency was false and fraudulent. This may be so; and, if so, it would be very good ground for proceedings in the Probate Court, to have the representation examined and set aside. But this Court is not authorized to inquire into the truth or falsity of the charge. The whole subject is committed to the sole jurisdiction of the Probate Court, which is able to regulate and adjust it. This Court cannot revise, in this mode, their proceedings. Under this same head, may be considered the charge, indirectly relied upon in argument, but forming great ground of complaint in the answer, that the administrators are improperly managing the estate, and using its income and proceeds for their individual ends. If this charge were true, the remedy is full and simple, in a different tribunal. The same court that appointed the administrators, can, for any maladministration or misuse of the estate, remove them, and appoint others, and more trust-worthy persons. This Court has no control over the matter. The same remark applies to the allegation of the insolvency of the securities upon the administration-bond of the complainants.

Upon the whole, I am satisfied that the injunction should be retained.

DECEMBER TERM, 1842.

GEORGE W. LATHAM v. MORGAN & FITZ.

Where a person is seeking relief in equity, against his grantor in a deed, on account of a failure in title to the property conveyed by the deed, a general charge of *defect of title*, without stating in what particular that defect consists, is not a sufficient charge to entitle him to any relief therefor.

Where the grantee in a deed is let into possession under his deed, and no eviction actual or threatened is charged, the allegation of the *insolvency* of the grantor, will not be sufficient to entitle the party to relief, against a defect of title to the property.

The words, "grant, bargain, and sell," in a deed, do not, under the statute of this State amount to a general warranty, or a covenant of seisin; but merely that the grantor has not done any act, nor created any incumbrance, whereby the estate might be defeated.

THE complainant, in this case, states, that on the 26th of December, 1835, he purchased, of Morgan & Fitz, land, at the price of \$21,000, payable, \$7000 in cash, \$7000 1st January, 1837, \$7000 1st January, 1838, all secured by notes dated 26th Dec., 1835: that by deed of trust to H. G. Johnson and Gideon Fitz, he conveyed, on the same day, land, to secure the payment: that the first two notes have been satisfied: that the trustees are about to sell the land to satisfy the remaining sum: that Morgan & Fitz, at the time of his purchase, assured him that he was getting land entirely free from difficulty, as to title: that by their deed they warrant "a good and sufficient title, free from all claims whatever:" that the title to all parts of said tract of land is involved in difficulty and obscurity; and, instead of being free from all difficulty, seems to be liable to be claimed by all persons ever owning it prior to Morgan & Fitz: that he subscribed stock in the Union Bank, and the title was considered defective, and the stock could not be had on it: that he had contracted to sell the land on fair terms, but, in consequence of defects of title, lately disclosed, had to take it back: that Morgan & Fitz, he believes, are insolvent, &c.

He prays a rescission of contract, an injunction against the sale by the trustees, and general relief. The bill was sworn to by an agent of the complainant, "to the best of his knowledge and be-

Latham v. Morgan & Fitz.

lief." The injunction was granted, and the defendants demur to the bill, and move to dissolve the injunction ; and upon this motion, and the demurrer, the case was submitted to the Chancellor.

Briggs, for the complainant.

[Mr. Briggs was the original counsel in the cause who filed the bill in the case ; he furnished the Court, however, with no brief, on the hearing of this motion.]

W. Thompson, for defendants.

The motion, in this case, is made to dissolve the injunction for the want of equity on the face of the bill, because the bill is not properly sworn to.

Complainant states, that on the 26th December, 1835, he purchased of the defendants, Morgan & Fitz, a tract of land in Hinds county, designated in the exhibit to his bill. Purchase-money, \$21,000, payable as follows : \$7000 at the execution of the deed, \$7000 on the 1st of January, 1837, and \$7000 on 1st January, 1838, all evidenced by promissory notes, dated 26th December, 1835, and the payment secured by deed of trust of same date, made to H. G. Johnston and Gideon Fitz, as trustees ; two first notes settled, and but one remains due. The trustees have advertised the land for sale to pay the third note.

Complainant protests against the sale, as he says, on the following grounds :

1st. In purchasing the land, he was assured that he was getting land free from difficulty as to title.

2d. That the deed made to him contains a warranty of title.

3d. That "the title to all the parts of said land is involved in difficulty and obscurity, and liable to be claimed by any or all persons ever owning them prior to the deed of Morgan & Fitz."

The bill states, that complainant cannot go into an accurate specification in this matter of title, but hopes it will be sufficient to say, he could not procure stock on it in the Union Bank.

Complainant states, that even if a title to a part of said land was in Morgan & Fitz, certain lots containing $361\frac{89}{100}$ acres, a part of said tract, and designated as S. $\frac{1}{2}$ sec. 20, and S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$

Latham v. Morgan & Fitz.

same, sec. 16, range 2, west, are involved in insuperable difficulty ; that said vendors never had a clear or good title to the same.

He also avers, that this lot of $361\frac{8}{10}$ acres is perhaps the only useful and valuable part of it : without this, he never would have purchased it, nor would any sensible man have done it. The bill vaguely alleges a wilful suppression of the defects of title : complainant states he had sold the land, and had to take it back, because he could not make a good title. The bill prays for a rescission of the contract.

Complainant was let into possession and now occupies the land, as is shown by his own Exhibit A, the advertisement of "the plantation now occupied by said Latham," and his Exhibit B, the deed of trust, by the terms of which he is to retain the possession, and to receive the rents and profits.

It is conceived, from the very vague and unsatisfactory statements of the bill, that complainant's only object, in obtaining the injunction, is delay. Complainant purchased the land in 1835, and was let into possession, and at the same time received a deed with covenants warranting the title, and has had the use and occupation for more than four years, and there is not an insinuation that he has ever been disturbed or molested in the possession, or that his title has ever been questioned by any one pretending to claim adversely. Although he charges, that the title of defendants, Morgan & Fitz, is not good, to at least a part of the land, yet he does not pretend to state the nature of the alleged defect of title ; nor does he state in whom there is an adverse title. The bill does not charge insolvency of the vendors in a way, as we conceive, that should have any influence on the motion to dissolve : in the last of the bill it is said, "your orator believes said Morgan & Fitz to be insolvent, and so charges." The fact of insolvency should be stated as a substantive charge, and made, at least, "from information and belief ;" and, from the rule established, and the principle in analogous cases, it is very questionable whether the charge upon "information and belief" alone, would be sufficient. It certainly cannot be good, when made in this intangible, unmeaning way, that he "believes, and so charges."

The vendors live in the country (as the bill shows, or should

show, for the residence of parties is required by the rule of Court, to be stated). The complainant does not state that he ever applied to them for information in relation to any supposed defects of title, or a request that the same should be remedied, which application good faith would require should have been made, after receiving the deed, before he endeavored to withhold the purchase-money ; and more especially, when complainant has had such long and uninterrupted enjoyment of the premises.

Upon an executed contract, the vendee cannot resort, except under peculiar or extraordinary circumstances, to a court of equity, but must rely upon the remedy which the covenants in his deed give him. Upon this subject, the Court is referred to Fonblanque, 1 book, page 288 (top paging), and the note thereto, and cases cited. See also 3 Marsh. 334 ; 3 J. J. Marsh. 583, 701 ; 1 J. J. Marsh. 481, 483 ; 4 Bibb. 273 ; 4 Monroe, 78.

As to the swearing to the bill, if the complainant had sworn to it himself, he would have been required to have stated, that the facts set forth, as of his own knowledge, are true, and those stated from information, he believes to be true. The legislature have said, no injunction should be granted, unless the chancellor shall be satisfied of the complainant's equity, either by affidavit, certified at the foot of the bill, that the allegations thereof are true, or by other means. Now, a person who signs the affidavit as agent for G. W. Latham, swears to the "truth of the foregoing bill of complaint," so far as he is informed, and verily believes. We contend, that this is no such swearing as the law requires, and that there is no precedent for it : that it is not enough to satisfy the mind of the chancellor of the truth of the facts set out in the bill.

Mayes, for complainant, in reply.

It is contended by the defendant, with reference to the bill,

1st. That it is manifest, from the vague and unsatisfactory statements of the bill, that the complainant's only object is delay. I answer, the bill seeks to rescind. If our only object is delay, the defendants may, by closing with our proposition to rescind, defeat at once that only object, and drive us to the necessity of paying the money, or submitting to a sale by the trustees. For the Court (if

Latham v. Morgan & Fitz.

the defendants put us to our election to pay or rescind) will compel us to make that election speedily, or we will speedily make it without being forced to do so. We might well retort, that the complainant's only motive for demurring, was to avoid exposing his fraud by exhibiting his papers, and thus leading to a rescission of the contract.

2d. The vagueness of the statements of the bill is objected to. It is alleged, positively, that the complainant believes "that no good title has been given or can be given him by the vendors, to this tract of land, or any part thereof." By the demurrer, then, it is admitted, "that no good title can be given to any part of the land." Can a court of equity say, although the vendees make assurances that they have good title, and have not and cannot make title to any part, and are insolvent, they may proceed with a good conscience (and consistently with equity) to enforce the deed of trust?

3d. But it is said, in defendants' brief, "the complainant purchased the land in 1835, and was put into possession, and at the same time received a deed with covenants of warranty, and has had the use and occupation for now more than four years. How do we know anything of this possession, or that the use and occupation continues? it nowhere appears in the record. For ought we know, it is waste land, purchased on speculation, without a stick cut on it. If the facts are as stated, let the defendants answer, and say so, and then avail themselves of it. But now, we know nothing respecting possession, or use: we only learn, from the deed of trust, that the trustees were to permit him to have it.

4th. It is said, that we have not applied to defendants for information of any alleged defects of title. We here apply, in the most solemn form; we say to them, in our bill, you had no good title, you can never make one; we call on you, if this is not true, to exhibit it. We have endeavored to get stock in the Union Bank, and, being unable to show title, lost the stock. We made a good contract for the sale of the land, but could not show title, and had to abandon the contract. Now, show title, if you have it, for we are unable to find it out. Are we to show what they have not, or shall they be held to show what they have?

5th. But it is said, it is an executed contract; and equity will not

Latham v. Morgan & Fitz.

enjoin the payment of the purchase-money on an executed contract ; that the party must be evicted, &c.

The authorities referred to do not apply, for two reasons.

1st. They are cases where the party has, by the covenants in the deed, provided himself with a legal remedy, which is adequate. Here, although we have covenants, they are unavailing, for the defendants are insolvent.

2d. They are cases where the covenants are not already broken. But, by the laws of Mississippi, every conveyance of land imports a covenant of seisin. See Laws of Mississippi, page 304. The covenant of seisin is here broken, if the allegations of the bill be true ; and a court of equity would as soon interpose (the covenant of seisin being broken), as it would where there was only the general warranty, and an eviction had taken place, even if insolvency was not alleged. Not only is it apparent, that the covenants in the deed are broken, so that we now have cause of action at law, but that we cannot have the fruits of a judgment, by reason of insolvency. The deed, containing the words, "grant, bargain, and sell," which raise the covenant of seisin, is not exhibited, and this may remove the force of the last ground ; but if we may go out of the record to learn that defendants were let into possession, and still retain it, we may go out of it to learn that there was a covenant of seisin.

But a conclusive argument, it is conceived, is, that the defendants have sold land, that the land is valuable, but the title defective, or involved in such doubts, that neither would the bank receive it, nor a purchaser from the complainant accept it ; and, these clouds hanging over the title, the vendors seek to force it into market in such a condition, that a sacrifice would inevitably ensue. They are, in conscience, bound to remove these obstructions to its bringing a fair price, before they bring it into market. Taking the bill to be true, the defendant, by his demurrer, says to the chancellor : true, I did induce the complainant to believe he obtained a good and perfect title ; true, I warranted that it was such ; true, the title is imperfect and invalid, and never can be perfected ; true, I have received \$14,000 on this sale ; and, true, I am insolvent. Now, I ask of your Honor, in equity, to permit me to proceed and sell the

land for the remaining sum of the purchase-money, although I cannot refund it, and although, under the circumstances, the land must be sacrificed. Do not require me to exhibit a valid title, so that the man I deceived may get a fair price, but let me sacrifice my vendee, if the title is good, by withholding the exhibition of that good title. I know the state of the title, the world does not, and I can make a fair speculation, as, under the circumstances, there can be no fair competition ; and, if it is invalid, I also have an advantage, for, by purchasing in the land, I can never be sued on my covenants of warranty, &c., they coming to me from my vendee, with the land. I will thereby save the \$14,000, which I have received for land to which I have no title.

The Chancellor will surely see, that the title is free from dispute, so that the land may come fairly into market. The trustees are trustees for both parties ; they should not bring the property into market, without seeing that all impediments to a fair price were removed ; and for them to sell land, the title being defective, would be a fraud on the purchasers. It would be inequitable for them to sacrifice an honest vendee, who has been deceived by his vendor, and thus to put a fraudulent vendor in possession of the fruits of his misrepresentation. It would be equitable in them to say to him, exhibit a fair title to the property you sold, that your vendee may have an opportunity of getting a fair price, and that bidders may know what they are buying, whether lawsuits, expense, and vexation, or an unencumbered estate ; or sales may be restrained in all cases where they are inequitable, or may operate a fraud on the rights and interests of third persons. 2 Story's Eq. 224. All injunctions are discretionary, and granted on the circumstances of the case. Ambl. 99 ; 2 John. Ch. R. 202. Of late granted more liberally than formerly. 7 Ves. 307.

As to the objection that the bill is not sworn to, I answer, if the affidavit of the party would be sufficient, *a fortiori*, will the affidavit of a credible disinterested person. If the affidavit made is defective in substance, the Court will give time to make a sufficient affidavit. That mode was considered sufficient by the judge who granted the injunction, and if the Chancellor be of a different opinion, he will only make an order, that the injunction stand dis-

Latham v. Morgan & Fitz.

solved, unless by a given day such affidavit be made as he may deem sufficient.

CHANCELLOR. The bill in this case makes a general charge of defect of title, without stating in what particular it consists, or in whom the adverse or paramount title is vested. This is a fatal defect. The complainant is bound to set forth in what the defect of title consists, that the Court may determine whether it amounts to an actual defect or not. This objection to the bill, of itself, would demand a dissolution of the injunction. But the complainant is not entitled to the relief he asks, for another and distinct reason. He shows, that he has received a deed with covenants of warranty, and his exhibits made a part of the bill, show also, that he was let into possession under his deed. No eviction, actual or threatened, is charged. Under such circumstances, the authorities are uniform, that he is not entitled to the interposition or aid of this Court. It is true, there is a charge of his belief of the insolvency of his vendors ; even if this insolvency were positively charged, under the repeated decisions of this Court, it would not be sufficient.

It is insisted, however, and assumed, that the deed containing the words "grant, bargain, and sell," amount to a covenant of seisin, under the laws of Mississippi ; that that covenant is here shown to have been broken, and that it is tantamount to an eviction at law, under the covenant of warranty ; which state of things would induce this Court to interfere.

I find that the same language used in our statute, is used in the statutes of Pennsylvania, Delaware, Illinois, Indiana, Missouri, and Alabama, viz : that the words "grant, bargain, and sell" in conveyances in fee, shall amount to a covenant, "that the grantor was seized of an estate in fee, freed from incumbrances done or suffered by him," and for quiet enjoyment against his acts. Yet the Supreme Court of Pennsylvania, in 2 Binney's Rep. 95, held, that those words did not amount to a general warranty, but, they were qualified to mean merely, that the grantor had not done ~~any~~ act, nor created any incumbrance, whereby the estate might be defeated ; and to this extent only, I apprehend, would a sound construction of the statute of Mississippi go.

Latham v. Morgan & Fitz.

The precise language of the statute (How. & Hutch. 349, sec. 32) is, "In all deeds or conveyances, whereby an estate of inheritance in *fee simple* shall hereafter be limited to the grantee and his heirs, the words 'grant, bargain, and sell' shall be adjudged an express covenant to the grantee, his heirs, and assigns, to wit: that the grantor was seised of an indefeasible estate in *fee simple*, freed from incumbrances done or suffered from the grantor, as also for quiet enjoyment against the grantor, his heirs, and assigns." To my mind, nothing can be plainer, than that these words do not amount to a general warrantee, and that their legitimate meaning cannot be extended further than to import, that the grantor has not incumbered the estate. The words are adjudged an express covenant of what? That the grantor was seised of an estate, freed from incumbrances done or suffered by the grantor; and a covenant for quiet enjoyment by the grantee, as against the grantor, his heirs, and assigns. It extends no further. It embraces the claims of no others. I am not disposed to extend its construction, and interpret words, that bear no such meaning on their face, beyond what the strictest construction of the statute will justify.

The motion to dissolve the injunction must be sustained.

Lowry & Puckett v. M'Donald & Rogers.

DECEMBER TERM, 1840.

LOWRY & PUCKETT v. M'DONALD & ROGERS.

Where the property of an intestate is sold by order of the probate court, the records of that court must show that the statutory prerequisites, for the validity of such a sale, have been complied with; otherwise, such sale would pass no title.

A purchaser, at an administrator's sale, who had not complied with the prerequisites of the law, in obtaining the order of sale, can obtain an injunction to the payment of the purchase-money therefor.

In a sale by a person who acts as the mere agent of the law, or ministerial officer, there is, as a general rule, no implied warranty of the *quality* or *property* of the thing sold; yet this rule does not apply, where such agent or officer assumes an authority where none is given by law; in such case, equity will grant relief.

THE bill in this case was filed to enjoin the collection of a note given for property purchased at an administrator's sale. It is not necessary to give a more detailed statement of the facts of the case, than is given in the opinion of the Court; the questions involved being principally questions of law, and the facts being admitted by the demurrer to the bill. The case was submitted upon the demurrer, and a motion to dissolve.

CHANCELLOR. No principle of law is better settled, than that the judgments of inferior courts of special and limited jurisdiction are void, and confer no rights, unless the facts upon which this jurisdiction attaches appear upon the face of the proceedings; and nothing is to be presumed in their favor. 5 Cranch, 173. And, although our courts of probate are not, in a general sense, courts of special and limited jurisdiction, their jurisdiction being full and complete over all those subjects, of which they have cognizance as courts of probate, yet the power given to the probate court to order a sale of the property of a deceased person, is of special jurisdiction, and does not necessarily belong to the jurisdiction of a probate court. To that extent, they are to be regarded as courts of inferior and special jurisdiction. The manner of exercising that jurisdiction is pointed out, limited, and defined by the statute (How. & Hutch. 417, 418, 420, sec. 110, 113, 119); and, in

Lowry & Puckett v. M'Donald & Rogers.

order to give validity to a proceeding under the statute, for the effecting a sale like the one in the present case, it must appear upon its face on the records of the Court, thus proscribed in its jurisdiction, that there has been a compliance with those previous steps which alone authorize the act. In other words, the ground of the jurisdiction, must appear in connection with the exercise of that jurisdiction, and if it does not, the proceeding will be considered as *coram non judice*. 9 Wheat. 733.

In the case before me, from the records of the probate court, it does not appear, and cannot be gathered, whether the sale of the real estate of the intestate was ordered for the payment of debts, the personal property having proved insufficient, or whether it was ordered upon the suggestion, that it would be for the benefit of the heirs, or upon what grounds; nor does it appear, that there was any notice given, or publication made, which were indispensable prerequisites, to the power of that Court, to order the sale, and to the validity of the sale itself. How. & Hutch. 417, 418, 419.

I am not aware of any principle upon which the sale in this case can be sustained upon the supposition, that the heirs were before the Court contesting its validity. And yet, I apprehend, this cause must be regarded in that light, and treated as though it were in that attitude. It is true, the title of a purchaser under execution, or order of sale, cannot be affected by any errors in the judgment or order, under, and by virtue of which, the sale takes place, if the judgment or order be not absolutely void, for want of jurisdiction, or other cause. Nor can the title of a purchaser be affected by any irregularity or misconduct of the officer making the sale, and in which the purchaser did not participate; a purchaser, in such case, is not bound to look into the regularity of the sale. (*Haynes v. Oldham*, 3 Monroe, Rep. 103; 2 J. J. Marsh. 342.) But these principles do not apply to the present case. Here the order of sale was absolutely void, for the reasons I have already given. No presumptions can be indulged in favor of the correctness of the proceedings of the probate court. They must speak for themselves.

It is said, that in sales like the present, there is no warranty, and that, therefore, no such relief can be given as is asked. Al-

622 SUPERIOR COURT OF CHANCERY.

Lowry & Puckett v. M'Donald & Rogers.

though it is a general rule, that there is no implied warranty in sales made by persons who act as the mere agents of the law, or as ministerial officers, yet this rule applies exclusively to the quality and property of the thing sold ; it does not apply, where such agent or officer assumes an authority where none is given by law ; where the vendor, in fact, assumes a character to which he is not legitimately entitled. In such case, it would not do to say the purchaser would be without remedy. (1 Hill's Ch. Rep. 494. In every view of the case, I think, the complainants are entitled to relief.

The motion to dissolve the injunction must be overruled.

JUNE TERM, 1842.

THEOPHILUS FREEMAN v. W. H. FINNALL, et al.

F. filed his bill against W. F., alleging that they had been partners, and that W. F. was indebted to him on their partnership liabilities, and also on his private account, in a large sum, not reduced to judgment, and seeking to attach a debt due by M. and D. to W. F., to be appropriated to the payment of W. F.'s debt to F.; *held*, that the court of chancery had no jurisdiction of the case.

A bill uniting partnership and private demands, filed by one partner against another, is fatally defective.

A creditor at large, cannot come into a court of chancery upon a purely legal claim, and enjoin his debtor from selling, receiving, or disposing of his effects.

Where a bill for injunction had been filed twelve months, and the answer, denying its allegations, been filed four months, and by law the complainant was authorized to take testimony in thirty days after the bill was filed, and a motion was made to dissolve the injunction; *held*, that a continuance of the motion will not be granted, to enable the plaintiff to procure testimony to sustain his bill.

The bill in this case was filed by Theophilus Freeman, against the defendant, W. H. Finnall, and others, and stated, that Finnall was a citizen of Virginia; that, in 1834, the complainant and Finnall commenced business jointly and in copartnership, for the period of three years, in the purchase and sale of negroes; that a full and final settlement of all the matters and things touching their copartnership had not yet been had; but, on such settlement, he verily believed, that said defendant would be indebted to the complainant in the sum of \$11,818.99, and that such balance would arise out of the payment, by complainant, of the sums of money particularly specified in the bill, on the joint and private account of core complainant and defendant, and advanced by him, for the use and benefit of said defendant, and for property sold to him. The statement of the several items shows, that they had connection with and pertained as well to the partnership, as their individual private business. The bill charged, that Finnall was utterly insolvent, that he claimed the benefit of a note, made by Benjamin L. Miles, to, and indorsed by, Murchison and Doyle, and others, dated on the 8th day of October, 1836, for ten thousand dollars, on which he had recovered judgment, and was endeavoring to col-

lect the same, and refused to appropriate the same, or any part thereof, to the satisfaction of the just claim of the complainant. The bill makes Finnall, and Murchison and Doyle, and Samuel Cotton (who had become security in the forthcoming bond in the execution at law), defendants to said bill. The prayer of the bill was "forasmuch as said Finnall has no property or estate within the State of Mississippi, except said judgment, that said Murchison and Doyle, and Cotton, be enjoined from paying over to the said Finnall the amount of said judgment, or any part thereof, until the claims of complainant could be heard in equity ; and, on final hearing, that they may be decreed to pay to the complainant, so much as shall appear to be due him from said Finnall ; and be is willing to take a transfer of said judgment and note, upon which it is founded, in satisfaction of so much of the claim upon said Finnall, if said Finnall will make it, or your Honor decree it," and prayed also for general relief.

The *subpæna* was executed on Finnall on the 25th January, 1841 ; on the 13th September, 1841, he filed his answer, admits the partnership with complainant, for the purpose of trading in slaves, and that it continued for the time charged. He admits, that the partnership dealings had not been fully settled, but had been in part adjusted, and shows to the Court, that defendant and complainant agreed to submit the whole matters of partnership dealings to the arbitrament of Thomas Botts, and Richard C. Moncure of Fredericksburgh, in the State of Virginia, for final settlement ; that they had awarded in part a division of the promissory notes then on hand, free from disputes and difficulty. Some notes and bills had been previously put in suit by said Freeman, and some by the defendant, the fate of which being doubtful, were left open for future award, when it should be ascertained whether the same could be collected or not ; some of said notes had since been collected and accounted for : and he insisted, that the matters which have been submitted to said arbitrators should be suffered to remain subject to that friendly jurisdiction until a final award was made, or the arbitrators refused to act in the premises. The defendant denied most of the items charged in the bill, and to the others set up, in avoidance, that the same matters were submitted to the arbitrators in Virginia, and that

Freeman v. Finnall, et al.

they were allowed by them ; upon this state of pleading, a motion to dissolve an injunction, granted by a circuit judge, was made, and the cause submitted on that motion. The complainant asked for a continuance of the motion to take depositions.

Montgomery, and *Boyd*, for the motion to dissolve.

Sanders, for complainant, in reply.

The material allegation of the complainant's bill is, that the defendant, Finnall, is indebted to him, the complainant, out of their transactions, in the sum of about \$11,818.99. This allegation is nowhere denied in the defendant's answer, and although the bill may not as fully as it should have done charge, that the said note on Miles was a partnership debt due the concern, yet such is the fact, and, from the whole tenor of the bill, it may be fairly inferred ; why else the language of the bill, speaking of said notes and judgment on Murchison and Doyle, "and is endeavoring now to collect the same, and refuses to appropriate the same, or any part thereof, to the satisfaction of the joint claims of the complainant." The answer does not pretend, that the said note did not originate in said partnership transactions, or that it belongs exclusively to defendant, or had ever been set apart to him by division or otherwise ; this is his language on that branch of the case : "Respondent admits, that he claims the benefit of B. L. Miles's note, described in complainant's bill, and insists, that no cause has been shown in the complainant's false, malignant, and multifarious bill, to warrant this Honorable Court in interposing, to deprive him of his legal right thereto."

In this condition, this cause is submitted upon bill and answer (together with the affidavit of Freeman the complainant, for a continuance, on the ground of want of time to take his depositions ; the names of the witnesses are exhibited, and what he expects to prove by each, and that they reside in four different States, two of which are remote from this ; that he and the defendant are residents of different States). It is true, that the bill is artificially drawn, but to the enlightened Court, there is enough shown for the purpose of retaining the injunction, at least, until the complainant may have an opportunity of procuring his testimony.

Story, in his *Equity Commentaries*, lays down this principle : "another species of tacit or implied trust, or perhaps, strictly speaking, of tacit or implied pledge or lien, is that of each partner in and upon the partnership property, whether it consists of lands, or stock, or chattels, or debts, as his indemnity against the joint debts, as well as his security for the ultimate balance due to him for his own share of the partnership effects." Vol. 2, page 490, 491. If it is permissible, I am prepared to offer affidavits to show that the said note of ten thousand dollars was given for partnership property, and I here have in my possession, and submit to the Court, the original deed of trust from Miles to Freeman, to secure the payment of the said note of ten thousand dollars. I have discovered, since this motion was made, that the bill is not as full upon this point as it should have been, and have so advised my client thereof, who will in due time offer an amendment.

I hope the Court will find sufficient to retain the injunction, at least, until the next term.

CHANCELLOR. The complainant, in this case, entered into partnership with Finnall, one of the defendants, in the trade of buying and selling negroes, for the space of three years. He charges in his bill, that the defendant became indebted to him, for money paid on account of their partnership liabilities, and for money advanced by him to the defendant, for his individual use ; the indebtedness on both accounts, amounting to about eleven thousand dollars. He states further, that Finnall had recovered a judgment for about ten thousand dollars, against the other defendants, Murchison and Doyle, and he prays an injunction to prevent the collection of that debt by Finnall, and that it may be applied to his own claim against Finnall. Independent of the denials of the answer of Finnall, I think it would be difficult to sustain the injunction of the complainant, regarding this bill, as true in all its statements. It is not pretended in the bill, that the judgment against Murchison and Doyle, is partnership property or effects. If it were so, it is difficult to perceive how the complainant could have overlooked a fact so important to the support of his bill.

A not less palpable defect in the bill is the joinder of private and

Freeman v. Finpall, et al.

partnership liabilities. If the complainant has advanced more than his portion in payment of the partnership liabilities, this would constitute him to that extent a creditor of the firm, to which he must look in the first instance for reimbursement, and, lastly, to the individual effects of his partner, and there is no allegation that the partnership effects are not adequate to his indemnity. The advancement of money by the complainant on account of the individual indebtedness of the defendant, would create nothing more than the ordinary relation of debtor and creditor ; to the adjustment of which a court of law would be amply adequate. There is no instance of allowing a creditor at large to come into this Court upon a purely legal claim, and enjoin his debtor from selling, receiving, or disposing of his effects. This can only be done after the creditor has reduced his claim to the shape of a judgment.

But apart from this view of the case, the answer of Finnall contains, I think, a full denial of the most important charges in the bill. The complainant asks for a continuance of the motion, to enable him to procure testimony to sustain his bill. The bill was filed about twelve months before the meeting of this Court, and the answer four months prior thereto. Under our statutes upon that subject, the complainant can proceed to take testimony at any time after the expiration of thirty days from filing his bill. I do not think, therefore, that the complainant is entitled to the indulgence he asks.

The injunction must be dissolved.

Shaw & Wife v. Thompson, et al.

DECEMBER TERM, 1843.

EDWARD SHAW AND WIFE, ADMINISTRATORS OF SAMUEL R. POWELL, DECEASED, v. SIMEON THOMPSON, et al.

P., being administratrix upon the estate of S. P., exchanged some notes of her intestate, for two negroes, which were inventoried as the property of the estate of S. P.; P. intermarried with S., against whom judgment was afterwards obtained, and execution thereon levied on one of these negroes; held, that the negro was the property of the estate of S. P., and not liable to the judgment.

If an administrator buy property with the means of his intestate, the property so bought will be considered and treated in equity as part of the estate of the decedent.

Where an administrator buys property with the effects of his intestate, and inventories that property so purchased, in the inventory of his intestate's effects, in the probate court, and the inventory is recorded in that court, the records of the inventory will be notice of the fiduciary character of the property so purchased and inventoried.

An administrator may have a right given to him by statute, of a trial at law of the right of property of his intestate's effects, when levied on by execution, without impairing the right of the administrator to relief in equity.

THE complainants, Edward Shaw, and his wife Mahala Shaw, late Mahala Powell, state in their bill that, at the May term, 1834, of the Holmes Probate Court, letters of administration on the estate of Samuel R. Powell, were granted to his widow, one of the complainants; that, before the administratrix made any inventory of the estate, she exchanged the note of A. G. M'Nutt, the property of her intestate, for two negro slaves; she afterwards made an inventory, and put said negroes in it, and returned it to the Probate Court, where it was recorded; afterwards she married the complainant, Shaw; that they hold said negroes in their fiduciary capacity; that Samuel R. Powell's debts were not all paid, nor had the said estate been finally settled; that Martha Ann and Samuel R. Powell were infants, heirs, without statutory guardians, of said Samuel R. Powell, deceased; and that no distribution of the estate had been made; that Simeon Thompson obtained a judgment in the Circuit Court of Holmes county, against Edward Shaw, individually, on a forthcoming bond, and against one Wm. Anderson, as his surety, for upwards of \$500; that execution thereon had been levied on one of the negroes, bought as stated in the bill, and that the sheriff would

Shaw & Wife v. Thompson, et al.

sell, unless prevented ; that, as administrator and administratrix, they could not try the right of property at law under the statute, and they pray for injunction and for general relief.

To this bill the defendants demurred, and the case was submitted upon that demurrer.

Fitch, and Brown, for the demurrer.

P. W. Tompkins, for complainant.

CHANCELLOR. The complainant, Mrs. Shaw, in this case, before her intermarriage with her co-complainant, became the administratrix of Samuel R. Powell, her deceased husband. Before she made any return of an inventory of her intestate's effects, she exchanged a note belonging to his estate, for two negroes, which she immediately inventoried as the property of her intestate; and this inventory was received and admitted to record in the Probate Court of Holmes county. After her intermarriage with Shaw, one of his judgment-creditors levied an execution against him on one of these negroes; and Shaw and his wife, as representatives of their intestate, filed their bill, praying for an injunction. The demurrer of the defendants to the bill, presents for my decision the questions involved in the case.

The defendants insist, 1. That the legal title to the negroes is in the complainants; that they could have sold the negroes, and made a good title to their vendee; and that, as a consequence, they are liable to the judgment obtained against Shaw, in his individual right. They contend that the administrators cannot, in their fiduciary capacity, make a purchase of property to which the character of assets would attach, except such purchase should be authorized by the Probate Court; under the act of 1830. Laws of Miss. 316.

2. That the remedy of the complainants, if any, is legal; that the administrators, in their fiduciary capacity, might have the statutory remedy, of the trial of the right of property; and, 3. That the administrators will not be heard in an attempt to protect themselves against their own illegal act.

The first and third objection, taken to the bill, are but the same objection, in a different shape; they involve the questions of the power of an administrator to dispose of the effects of his intestate;

Shaw & Wife v. Thompson, et al.

and of how far a court of equity will follow property of an intestate, in the hands of other persons, and clothe it with the character of assets. Although a court of chancery would not encourage the purchase of property, by an administrator, with the money or other effects of the deceased, and though the validity of such sale might be questioned, yet, when such a purchase has been made, and it is attempted to turn the property thus bought to a different purpose from that intended, to divert it from its legitimate channel, it is surely the duty of this Court to interfere. Even in England, where it has been held, that an administrator might make a valid sale of effects of his intestate, they have also held, that if the fact could be established, that the purchaser had notice that the property he was buying of the administrator was assets of his intestate; that, then, the property might be pursued and taken in his hands by distributees or creditors of the intestate. Was there not notice in this case, constructive, at least, that the negroes thus purchased by Mrs. Shaw, with her intestate's property, had themselves, by that purchase, become assets of her former husband's estate, and of the trust-character thus affixed to them? I think there was. It is distinctly alleged in the bill, that these negroes were purchased before any inventory of Powell's estate was made out, and that immediately upon their purchase, they were inventoried as effects of Powell, and that this inventory was admitted, according to law, to record in the Probate Court. This is sufficient to fix upon them the character of assets, and to convey notice to all persons of that fact.

In 4 Desaus. 153, it was held, that the court would follow a note of hand, as the property of an estate, if really taken in payment of assets of the estate sold by the administrator; and that, too, though the note be payable to the administrator in his private name; and will enforce the rights of the estate, by injunction against the private creditors of the administrator, seeking relief at law. With equal propriety would slaves, similarly situated, be subjected to the same rule.

But it is said, that the administrators are not the proper parties, at whose instance the Court would interpose, if at all. This objection is not, however, a valid one. This is not a case of administrators, who have sold property of their intestate as their own, seeking

Shaw & Wife v. Thompson, et al.

to set aside such sale. It is not necessary that I should determine whether the Court would interfere at their instance or not, in such a case.

Here, the administrators have never set up a right to the property levied on, nor are they asserting a claim to it as their own ; they have uniformly continued to treat them as assets of their intestate, in their hands to be administered. They bought them for the estate of Powell, inventoried them as such, and hold them as such. They are, then, seeking to protect from illegal seizure and sale their intestate's property, held by them in trust; this they have a right to do.

With reference to the second objection to this bill, taken by defendants, that the remedy of the complainants is at law, it is sufficient merely to say, that, if they have the remedy, spoken of, at law, it does not take away from them the right to be heard also, and obtain relief, in this Court. The remedy, if it exist at all, is one given by statute, and was not designed to take away any rights that previously existed.

Let the demurrer be overruled.

Montgomery, et al. v. The Commercial Bank of Rodney.

DECEMBER TERM, 1843.

ANDREW MONTGOMERY, et al. v. THE COMMERCIAL BANK OF RODNEY.

By the constitution of Mississippi, "a separate superior court of chancery" is created, "with full jurisdiction in all matters of equity;" it is provided, that "the chancellor shall be elected by the qualified electors of the whole State, for the term of six years, and shall be, at least, thirty years old at the time of his election;" the legislature afterwards passed a law, providing for the appointment of a special chancellor, by selection of the parties litigant, or by lot, if they could not agree, to set in the trial of any case, where the chancellor, from interest or other cause, was disqualified from trying the case; *held*, that the act of the legislature was not unconstitutional.

The statute authorizing circuit judges to grant injunctions, "within their respective circuits," limits their power to cases which have originated within the districts over which their jurisdiction extends; and an injunction in a case originating and to operate beyond their districts, granted by a circuit judge, is void.

A banking corporation has power to make an assignment of its effects, for the benefit of its creditors, to trustees, and such an assignment will be upheld in equity.

The legislature of Mississippi, in the year 1840, passed an act, declaring, that "no bank in this State shall transfer, by indorsement or otherwise, any note, bill receivable, or other evidence of debt;" *held*, that this act did not take away from a bank in failing circumstances the right to make a general assignment of its effects, for the benefit of its creditors.

Quere. Is not a law, prohibiting corporations from the performance of acts not prohibited by their charter, and not extending the prohibition to individuals, in conflict with that clause of the constitution declaring "all freemen, when they form a social compact, equal in rights?"

THE bill, in this case, averred, that the complainants were two of the stockholders of the Commercial Bank of Rodney: that at a meeting of the stockholders, at which they were not present, and of which they had no notice, it was agreed to assign the bank to trustees for the benefit of the creditors: that the directory of the bank accordingly made such an assignment, on the 28th of March, 1843, to the defendants, Freeland and Murdock, two of the directory. By this assignment, the directory transferred to the trustees "all the stocks, bills receivable, books, judgments, accounts, mortgages, deeds of trust, claims, demands, and rights of action, as set forth in the schedule annexed" to the assignment, and, by the same assignment, conveyed all the other property of the bank, real and personal, describing the same; and also, as well that enumerated spe-

Montgomery, et al. v. The Commercial Bank of Rodney.

cifically, as that not described in full : that the trustees had accepted the trust, and entered upon the discharge of their duties.

The bill charges, that the assignment was contrary to the act of the legislature prohibiting assignments on the part of banks ; was contrary to law, and was designed to defraud the stockholders and creditors of the bank : that an application for a *quo warranto*, for a supposed forfeiture of the charter of the bank, had been made to the Circuit Court of Jefferson county ; that it was in apprehension of the result of that proceeding, that the assignment had been made : that, by the assignment, the bank had ceased to be a body corporate and politic.

The bill was lengthy, and recited the terms and peculiarities of the assignment, which was, of all the effects of the bank, to pay its creditors generally ; first, however, paying the salaries of the trustees, and of their clerk.

The bill prayed for an injunction against the defendants' acting further as assignees, and for a total rescission of the deed of assignment, and other relief.

An injunction was granted by the Hon. A. G. Brown, one of the circuit judges, whose district did not embrace the county of Jefferson, in which the bank was located.

To this bill, there was a general demurrer.

[Thomas Freeland, Esq., one of the trustees, and the former president of the bank, was a near connection of the present chancellor, and the chancellor considered himself, therefore, disqualified to sit in the case : he accordingly directed that a special chancellor should be appointed, in the mode prescribed by the act of 1840. W. R. Miles, Esq., of the county of Yazoo, was selected, in the appointed manner, and presided in the trial of the case.

The constitutionality of the law under which he was appointed, was one of the questions presented for his decision. For the more perfect elucidation of the opinion, the section of the constitution, and the different acts of the legislature, referred to by Mr. Miles, in his opinion, have been subjoined.]

George S. Yerger, for the defendants.

This bill is one, truly, of an extraordinary character. The

Montgomery, et al. v. The Commercial Bank of Rodney.

complainants are two stockholders in the Rodney bank; and, as such, they allege, that the directory called a meeting of the stockholders; that some six or eight attended; and that, in pursuance of a resolution made by these stockholders, the directors made a conveyance or assignment of all its property and effects, to pay its debts, to Thomas Freeland and Jno. Murdock, which, it alleges, was void. There are very extraordinary features in the bill, which will be stated, in the different points hereinafter set forth. Suffice it to say, that these two stockholders have enjoined the assignees, and all others, from paying and receiving money, collecting judgments, &c., to the amount, as alleged in the bill, of \$600,000 or \$700,000 dollars; and the immense damage their injunction may occasion, is secured by a bond of \$2000.

1st. I am desirous of having this case decided on the merits. The first point raised in the bill, is, that a majority of the stockholders did not direct the assignment to be made. To this, it is answered, the directory, without any directions of the stockholders, had ample power to make an assignment of all the property of the bank, to secure its debts. This point has so frequently been adjudicated, that a bare reference to the cases is sufficient.

All the cases were minutely examined, and the point decided, in the case of the Real Estate Bank of Arkansas, reported in pamphlet. Also, the recent decision of the Supreme Court of Pennsylvania, in the case of the assignment of the United States Bank of Pennsylvania; and in the following cases: 7 Gill and Johns. 468; 6 ib. 205, 363; Angell and Ames, on Corp. 59, 64, 509; 6 Conn. Rep. 233; *Pope v. Brandon*, 2 Stew. Rep. 400; 5 Peters, 647.

2d. It is next insisted, that the assignment is prohibited by the 7th section of the bank act of 1840.

That section, although general in its terms, was intended merely to prohibit transfers of individual notes, so as to prevent them from being paid in the paper of the bank. It never was designed to prevent an assignment of all its property, for the payment of its debts, where that assignment stipulated, on its face (as this does), that the debtors of the institution might pay their debts in the paper of the bank.

But, if it were otherwise, the act is unconstitutional. The char-

Montgomery, et al. v. The Commercial Bank of Rodney.

ter, ride — section, gives ample and express power to the bank to dispose of its property and effects, in any way : and if no such express power was given, it was necessarily implied.

It is by virtue of this power, that the bank has authority to make a general assignment. This power being granted by the legislature, they have no power, afterwards, to prevent its exercise. *Vide 3 Story's Com. Con.* 242, 243, 258, 259 ; *People v. Marshall*, 9 Wend. 351.

3d. It is again objected, that the bank owed State and county taxes, which were assessed before the assignment ; and, that the assignment is a fraud on the State.

If this is so, the State can protect itself. If it is a fraud on the State, it is void only as to the State ; and, as these complainants are not the State, it is presumed it does them no damage.

But this is not so ; if anything is due for taxes, the assessment constituted a lien, or preference, in payment; and the State can enforce this, notwithstanding the assignment. Act of 1841, page 59, sec. 19. It is not pretended, that the taxes shall not be paid ; no provision was made for the payment of the taxes, nor was any necessary, because the law had made it.

4th. It is next objected, that the assignees, or trustees, gave no security, nor was any required by the deed. The law does not require trustees to give security, except executors, administrators, and guardians. If the trustees are improper persons, or do acts inconsistent with their duty, the Court will remove them : but it does not invalidate the trust. In none of the cases cited, in the first point, was security required, except in the Arkansas case ; and in that case, the deed of assignment made it necessary, otherwise it would not have been required. A natural or artificial person may assign its property to trustees, both with or without imposing the condition, that security shall be given. If the trust is abused, the trustee will be removed.

5th. It is again objected, that the directors made two of their own body the assignees. It is not perceived why, if they have the power of making an assignment, they should not appoint one of their own body. Any person may act as trustee. The directory does not convey to the directory; they convey to A. B. and C. D.,

Montgomery, et al. v. The Commercial Bank of Rodney.

as individuals. This precise point arose in the case of *Pope v. Brandon*, 2 Stew. Rep. 400.

6th. It is again charged, that an information, in the nature of a *quo warranto*, was issued against said bank, to show by what warrant she exercised the right of banking; here it charges, that the assignment to trustees was made to forestall public justice, and to avoid the consequences of a judgment of seizure.

To this novel charge, it is scarce deemed necessary to say anything. It has been heretofore considered, that an assignment made to prevent honest debts from being paid was fraudulent. But this is the first time that it has been contended, that an assignment made to pay debts was fraudulent, because a proceeding was instituted against a bank, which, if successful, would prevent it from paying its debts.

The law on this subject is, however, well settled; all transfers and conveyances made by a corporation, before judgment of seizure, are valid.

But if there is anything in this objection, it will be high time to make it when the judgment on the *quo warranto* is given.

It may be, it never will be given. And it would be a peculiar novelty to set aside a conveyance, by a corporation, upon the ground it was intended to avoid a judgment of seizure, before such judgment of seizure was rendered.

Again, what right has a stockholder to complain? He is not injured by it. He is benefited. If this puerile objection were available at all, it could only be taken advantage of, by those gentlemen debtors, who rely on the *quo warranto* as a "new way to pay old debts."

But, if there were a judgment in the *quo warranto*, and the assignment was made with a view to prevent extinguishment of the debts, and to provide against it; so far from its being fraudulent, the purpose is a just one, and will be sustained in law. That was the object of the assignment, in the case of *Pope v. Brandon*, 2 Stew. Rep. 401. The charter was about to expire, and the debts thereby would have been extinguished, &c. To prevent this effect the assignment was made.

G. T. Martin, for the complainants.

Montgomery, et al. v. The Commercial Bank of Rodney.

W. R. Miles, special Chancellor, delivered the following opinion.

This cause was submitted on motion to dissolve the injunction, for want of equity on the face of the bill. The argument at the bar rested upon the following points.

1st. The unconstitutionality of the act of 1840, providing for the appointment of a *special chancellor*, when, by reason of interest, or other cause, the chancellor is incompetent to sit.

2d. The right or power of a circuit court Judge to grant an injunction, without the limits of his own district ; and,

3d. The power of a banking corporation to make a general assignment of its assets to trustees, for the benefit of creditors since the act of 1840.

1st. I will premise, in reference to the first question, that, although the inclination of my own mind should tend most strongly to the conclusion, that the act of 1840* is unconstitutional, I would

*The following is the act of 1840, referred to by Mr. Miles :
"An act to provide for the determination of certain causes in the Superior Court of Chancery.

"SECTION 1. Be it enacted by the legislature of the State of Mississippi, that in all cases depending in the Superior Court of Chancery of this State, where the chancellor is incompetent to sit by reason of interest, or for other causes, the cause or causes shall be heard and determined, as well upon final hearing as upon applications for interlocutory orders, in the following manner, to wit :

"The parties, by their counsel, shall select some member of the bar in attendance on the Court, and, in the event they do not make such selection, then it shall be the duty of the Court to designate at least four of the members of the bar in attendance as aforesaid, not of counsel interested or related to the parties, and from that number one shall be chosen by lot ; when such selection in either of the two modes aforesaid shall be made, it shall be the duty of the chancellor to retire for the time from the bench, and the said member of the bar so selected shall take his place, and hear and determine the cause or causes for which he shall have been so selected.

"Sec. 2. Be it further enacted, that in all cases and in every cause tried, heard, and determined, according to the provisions of the foregoing section, it shall be the duty of the chancellor to enter the proceedings in the Court, by virtue of this act, as if the same were had before him ; and it shall be his duty

Montgomery, et al. v. The Commercial Bank of Rodney.

hesitate long before so pronouncing it. The chancellor, whose place I now temporarily occupy, has repeatedly held it to be constitutional; and, unless the question was made to appear so clear, as to leave not the shadow of a doubt resting upon it, I should hardly be expected to adopt a different rule of decision.

As presented, it is a question of no little difficulty; and the most enlightened members of the profession may well entertain different opinions upon it. By* the 16th sec. of the 4th art. of the new constitution, it is provided, that "a separate superior court of chancery shall be established, with full jurisdiction in all matters of equity," &c., &c., and that "the chancellor shall be elected by the qualified electors of the whole State, for the term of six years, and shall be at least thirty years old at the time of his election." This language would seem to indicate, pretty clearly, that no one can legally occupy the chancellor's chair, unless he shall have attained the age of thirty years, and have been elected by the qual-

to sign all, and every, and any decree or decrees to be tendered in the cause or causes, as the same would have been signed, had the decree been rendered by him when presiding in Court; and in every other respect, the records, minutes, and proceedings, shall be and appear as if the selection provided for by this act had not been made.

"SEC. 3. Be it further enacted, that in all causes tried, heard, and determined, according to the provisions of this act, appeals and writs of error shall be granted and allowed by the chancellor, or otherwise, as by law now provided in other causes.

"SEC. 4. And be it further enacted, that this act shall commence and be in force from and after the passage thereof.

"Approved February 20, 1840."

*The following is the 16th section of the 4th article of the present constitution of Mississippi:

"A separate superior court of chancery shall be established, with full jurisdiction in all matters of equity: *provided, however,* the legislature may give to the circuit courts of each county, equity jurisdiction in all cases, where the value of the thing or amount in controversy does not exceed five hundred dollars; also, in all cases of divorce, and for the foreclosure of mortgages. The chancellor shall be elected by the qualified electors of the whole State, for the term of six years, and shall be at least thirty years old at the time of his election."

Montgomery, et al. v. The Commercial Bank of Rodney.

ified electors of the whole State. Yet we find, that in 1833, an act was passed, which, if constitutional, precludes the idea of indulging in such a construction.* How. & Hutch. Dig. 95, sec. 26. It is provided by this act, that "when any vacancy shall occur in any State office, the unexpired term of which does not exceed twelve months," &c., the governor may fill the same by executive appointment. Should the chancellor die, or resign, leaving an unexpired term of one year, or less, the governor is authorized to fill it by appointment. This act was passed nearly contempor-

* The act of 1833, is as follows :

"An act to provide for, and prescribe the manner of, filling vacancies in public offices.

"SECTION 1. Be it enacted by the legislature of the State of Mississippi, That all vacancies which exist at the time of the passage of this act, or which may occur before the general election in May next, in any State or county office in this State, where the officers filling the same are required by law to be commissioned by the governor, shall be filled by executive appointment; which appointment, so made, shall continue in force until the general election in May next, and until the successor or person elected to any such office, is duly qualified, and the incumbent be notified thereof, by a certificate of the person before whom the oath is administered, that the person elected has received a commission from the governor, and has taken and subscribed before him the oath of office, prescribed by the constitution.

"Sec. 2. Be it further enacted, That when any vacancy shall occur in any State office in this State, by death, resignation, removal, or otherwise, after the general election in May, 1833, when the unexpired term of the office so vacated shall not exceed one year, the same shall be filled by executive appointment; and whenever any vacancy shall occur in any such office, when the unexpired term thereof shall have more than one year to run, it shall be the duty of the governor, when notified of such vacancy or vacancies, to issue a writ or writs of election, requiring an election to be held to fill the unexpired term of said office, in the particular district, or in the State, as the case may be; which election shall be held, in the case of filling any vacancy in the office of a district officer, on thirty days' notice; and in the case of a State or general officer, on sixty days' notice: *provided, however,* that the governor of the State may make a temporary appointment to any office, a vacancy in which occurs, to have effect and be in force until the elections so ordered by him shall have been held, and the successor, or person elected to the office, be duly qualified, in the manner prescribed by this act."

Montgomery, et al. v. The Commercial Bank of Rodney.

neously with the adoption of the new constitution. In the legislature that passed it, was a large number of the delegates who framed the constitution. From that day to the present, no one has had the temerity to call in question its constitutional validity. The members of the bar, the executive of the State, the courts of justice, from lowest to highest, have all, with an unbroken unanimity, decided in favor of its constitutionality. There is scarcely a judicial post in the State, the incumbent of which has not, at some point of time since 1833, rested his claim to administer the law upon office, the tenure of which was thus obtained.

If, then, the act of 1833 be constitutional, why is not the act of 1840? The chancellor, who has taken his seat by virtue of an executive appointment under the act of 1833, is not elected by the qualified electors of the whole State! any more than is the special chancellor, who takes his seat under the provisions of the act of 1840. The same rule of construction, applied to both acts, will alike render them valid or invalid.

But, again. In turning to the 4th section of the schedule appended to the new constitution, we find the following language: "All laws now in force in this State, not repugnant to this constitution, shall continue to operate, until they shall expire by their own limitation, or be altered or repealed by the legislature." It hence becomes necessary, to inquire how the law stood in relation to this matter before the adoption of the new constitution. The chancellor at that time, it is true, was not elected by the qualified electors of the whole State, but his election to office was as peremptory in its terms, and as unqualified in its results. Rev. Code, 550, sec. 6; 548, sec. 17; 84, sec. 2.* As the chancery court

* Sections of the law of 1821, organizing the old Chancery Court, referred to by Mr. Miles:

"CHAPTER XII.

"SEC. 2. The said Court shall have exclusive jurisdiction over all matters, pleas, and plaints, whatsoever, belonging to, or cognizable in, a court of equity: and the chancellor shall have power, either in vacation, or term time, to grant writs of injunction, to stay waste, to enjoin execution of a judgment, or to

Montgomery, et al. v. The Commercial Bank of Rodney.

was then established, its jurisdiction was as ample, its powers as full, and its incidents the same, as belong to it under its present organization. It will be seen, by consulting the law of that day, that whenever the chancellor was incompetent to sit in any cause, it was removed into the Supreme Court for trial and determination. Rev. Code, 86, sec. 7. The judges of that Court, under the old constitution,* had no original chancery jurisdiction. They were appointed to fill another and distinct office; and, unless it can be made to appear, that an election and qualification to discharge the duties of one office, *ipso facto*, renders the person elected com-

stay proceedings at law; to grant writs of *ne exeat*, and all other remedial writs, returnable into said Court, and properly belonging to a court of chancery, and to hear and determine the same, according to the rules of proceeding hereinafter prescribed.

Rev. Code, 88, sec. 2.

"Sec. 7. When the chancellor shall be interested in any cause depending in the Superior Court of Chancery, or related to either of the parties, or in any manner situated, so as to render it improper, in his judgment, to preside at the trial, it shall be the duty of the chancellor to enter upon the record the cause of such unfitness, and that he is unwilling to preside at the trial; and thereupon such cause shall be removed into the Supreme Court, and such proceedings may be had therein as in other suits in chancery: and the said Supreme Court shall proceed to a decision thereon, and certify the same to the Superior Court of Chancery of the proper district, to be there entered as the final decree of the Court in the cause, and execution may issue thereon, as in other cases.

Rev. Code, 86, sec. 7."

* The following are the sections of the old constitution referred to:

"ARTICLE 4.

"Sec. 17. The appointment of all officers not otherwise directed by this constitution, shall be by the joint vote of both houses of the general assembly; the votes shall be given *viva voce*, and recorded in the public journal of each house; provided, that the general assembly be authorized to provide by law for the appointment of all inspectors, collectors, and their deputies, surveyors of highways, constables, and such other inferior officers, whose jurisdictions may be confined within the limits of the county. Rev. Code, 548, sec. 17."

"ARTICLE 5.

"Sec. 6. The legislature shall have power to establish a court or courts of chancery, with exclusive original equity jurisdiction; and, until the establishment of such a court or courts, the said jurisdiction shall be vested in the superior courts respectively.

Rev. Code, 550, sec. 6."

Montgomery, et al. v. The Commercial Bank of Rodney.

petent to discharge the duties of any or every other office in the State, it will be impossible to find a higher constitutional sanction for their acts, than for those of the present incumbent. They determined such causes, not as judges of the Supreme Court, but as special chancellors, under the act before cited. Rev. Code, 86, sec. 7. The question then recurs, is this act, of 1822, repugnant to the new constitution? If it be, it is only so, because of the difference in the manner of the chancellor's election under the old and new constitutions. I apprehend, that this difference cannot be relied on, with any degree of plausibility, for the purpose of proving the act of 1822 incompatible with the mandate of the new constitution. If, then, the old Supreme Court, as a special chancery court, although it had no equity jurisdiction, except in cases of appeal, might try and determine chancery causes, under an act of the legislature; and if that act is still in force by the 4th section of the schedule appended to the constitution; and if, by the provisions of that act, the judges of the present Supreme Court might, as special chancellors, try and determine this cause; why may not a member of the bar, as special chancellor, under the act of 1840, passed for a similar purpose, and containing in substance the same provisions with the act of 1822, try and determine it? I am at a loss to perceive why he may not, unless the trappings of office, that hang around a man as judge of the Supreme Court, clothe him with powers sufficient to try causes in any and all the courts of the State.

There is another view of this question, that deserves a careful consideration. Conceding to the argument of complainant's counsel its fullest weight, it yet seems to me, that an application of an obvious rule of construction to this question, will furnish an unerring criterion by which it may be determined. In construing a grant in the federal constitution, the power sought to be exercised must be deduced from the plain and obvious meaning of the context; or, it must be indispensably necessary for carrying into effect the expressly delegated power. But, in giving a construction to a grant in a State constitution, a rule diametrically opposite prevails; and everything not inhibited, every power not expressly, or by necessary implication, taken away, may be exercised by the State.

Montgomery, et al. v. The Commercial Bank of Rodney.

government. Now, although it is declared by the new constitution, that "a separate superior court of chancery shall be created, with full jurisdiction in all matters of equity," and that "the chancellor shall be elected by the qualified electors of the whole State, for the term of six years," &c.; yet I apprehend, this grant does not prohibit the legislature (when the chancellor from any cause is incompetent to try a particular case, depending in his court) from providing the only means, and passing the only law, that could be passed, to insure the speedy and effectual administration of justice, in this same "superior court of chancery." Unless this construction shall obtain, the 14th section in the "Bill of Rights," will be most shamefully violated. For how would any person, whose interest conflicted with the chancellor's, and whose rights were of an equitable character, avail himself of that grant, wherein it is said, "that all courts shall be open, and every person, for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay," if it be not in the power of the legislature to provide some means of trying such cases? If the legislature has not this power, the grant in the Bill of Rights is without meaning, and it was a work of folly and supererogation, to engrave it on the charter of our rights. I come, therefore, to the conclusion, that the act of 1840 is constitutional, and will accordingly proceed to determine the case upon its merits.

2d. The powers of circuit court judges, in granting injunctions, have been so repeatedly limited and defined by the decisions of this Court, that I might safely rest my opinion upon them. I will, however, refer to the statute, the positive and peremptory language of which leaves no room for doubt. By the act it is declared, that "the judges of the said (circuit) courts, shall, within their respective circuits, have power to grant writs of injunction, and *ne exeat*, either in vacation, or term time, &c., &c. How. & Hutch. Dig. 486, sec. 25. This language is susceptible of but two interpretations, to wit: either that the circuit court judge, at the time he grants an injunction, must be within the limits of his district; or the case, requiring his fiat for an injunction, must have originated within his district. It surely need not be argued,

Montgomery, et al. v. The Commercial Bank of Rodney.

that the latter is the correct interpretation. A moment's reflection, upon the extent of jurisdiction conferred by the constitution and laws upon each circuit court judge, will afford a satisfactory solution of the question. Unless the act of 1841 repealed the act just cited, there can be no doubt, that the fiat in this case was granted by an incompetent person. That act declares, "that writs of injunction and *ne exeat*, orders requiring bail in chancery, &c., may be granted by any circuit judge, &c., in all cases in which, by law, the same may be properly granted. Sheet acts of 1841, 123 and 124, sec. 1. It is clear to my mind, that this act does not repeal the act of 1822; but simply gives the circuit court judges the right to grant injunctions and other remedial process in all cases, in which, by law, the same might be properly grantable; and, of course, reference must be had to the law, as it existed prior to the passage of this act, in order to give it a correct construction. It is, therefore, manifest, that Judge Brown, who granted the injunction in this case, transcended his power; and his fiat is therefore void.

3d. The power of a banking corporation to make assignments to trustees for the benefit of creditors, is a principle of law too well settled to require reference to authorities to support it. Indeed, counsel for complainant admitted its correctness at the bar; but contended, that this principle of the general law had been limited, if not entirely repealed, by the act of 1840. See Sheet acts, 15, sec. 7. By the provisions of this act, "no bank in this State shall transfer, by indorsement or otherwise, any note, bill receivable, or other evidence, of debt; and if it shall appear in evidence upon the trial of any action upon any such note, bill receivable, or other evidence of debt, that the same was so transferred, the same shall abate, upon the plea of the defendant." To ascertain whether the construction put upon this statute of complainant's counsel be correct, I will apply some familiar rules of construction. 1st. What was the law before the passage of this act? 2d. What was the mischief for which the law did not provide? and, 3d. What remedy was attempted to be provided for the suppression of the existing evil?

By the law, as it had been declared before the passage of the act

Montgomery, et al. v. The Commercial Bank of Rodney.

of 1840, last referred to, any of the numerous banks in this State might have transferred their notes, bills of exchange, &c. by indorsement or delivery. See *Fleckner v. U. S. Bank*, 8 Wheat. Rep. 335 to 363. The evil complained of was, that many of the banks, under shelter of the law thus declared, were transferring large amounts of their bills receivable, in some instances, to preferred creditors; but in many, if not in most cases, these assignments were made to nominal creditors only, for the purpose of consummating the most enormous and cunningly devised fraud upon their note-holders. This transfer of their bills receivable by the banks diminished, to an amount equal to the gross sum assigned, the legitimate fund for the redemption of their circulation. This caused a rapid and unexampled depreciation of their notes, which resulted in so much clear loss to the community; especially, when it is recollectcd, that the assignees of these bills receivable refused to take the bank circulation in payment, and insisted on gold and silver. The debtors of the banks, after notice of the assignment of their liabilities, could not procure the bank notes, and plead them as sets-off. The consequence was, that the circulating medium of the State suffered a reduction, upon its nominal value, of from 50 to 90 per cent., whilst the community, who held the bank's paper, — in whose possession it had thus been caused to depreciate, and become comparatively valueless, and a large number of whom were also indebted to these same banks, — were compelled to discharge their assigned liabilities in gold and silver; and, at the same time, were shut out from all hope of having the depreciated paper in their possession converted, upon presentation, into the constitutional currency, or its equivalent.

To remedy this evil, the legislature passed the act last referred to. To manifest more clearly, if possible, its intention, a supplemental act was passed, at the same session, declaring that all banks in this State shall, at all times, receive their respective notes at par, in liquidation of all claims due them. Sheet acts of 1840, 21 and 22, sec. 2. At a subsequent session, an act was passed, extending the benefits of the supplemental act to all persons, who should be garnisheed as debtors of any bank within this State. See Sheet acts of 1842, 140 and 141, sec. 2 and 3.

Montgomery, et al. v. The Commercial Bank of Rodney.

Taking, therefore, all the legislation on this subject together, it is manifest, to my mind, that the act of 1840 was never designed to operate upon or prevent such an assignment as this; but was intended alone to prevent those partial and fraudulent assignments, conceived in sin, and carried out in iniquity, the obvious tendency of which was, to depreciate and render worthless the paper of all those banks that made them, and so to diminish the fund pledged for the redemption of their circulation as to banish all hope of its ever being taken up.

But it may well be questioned, whether the act of 1840 possesses any binding or obligatory force whatever. The Supreme Court, at its last January session, in the case of *The Commercial Bank of Manchester v. John T. Nolan, et al.*, held that a bank is a person, artificial, it is true, but endowed with all the privileges of a natural person, except such as are expressly denied or inhibited in its charter. Now, I ask, if it be competent for the legislature, by a special act, to say that A, or A, B, and C, shall not assign or transfer any of his or their bills receivable, by indorsement or otherwise; whilst every other man in the community is left free to do so? Would not such a law be in direct and palpable conflict with the 1st article of the "Bill of Rights," wherein it is declared, "that all freemen, when they form a social compact, are equal in rights?" If, then, a corporation possesses every power and privilege common to a natural person; and if the charters of the banks in this State do not prohibit them from "assigning" or "transferring" their bills receivable or other evidences of debt (and they do not), I am at a loss to perceive, — until the Supreme Court shall alter its opinion, and curtail the powers and privileges of corporations, — from what source the legislature derived its power and authority to pass the act of 1840, denying to banks the right of assigning their bills receivable.

In every light which I have been able to view this question, my mind has returned, after each effort, with renewed energy to the conclusion, that the assignment to Freeland and Murdock, as trustees for the benefit of the creditors of the bank, was lawfully made; that it is such a conveyance as the contracting parties were competent to make; and is, therefore, valid in law. The injunction must, accordingly, be dissolved.

Warren v. Haley, et al.

DECEMBER TERM, 1843.

**ANN EMILY WARREN, by her next friend, v. PHILIP R.
HALEY, et al.**

S., by deed of gift, conveyed to **F.** certain negroes, in these words, "in trust for the use and benefit of my daughter Ann, and her lawful heirs;" "in trust for the proper use and benefit of the said Ann, and her heirs forever;" *held*, that these words conveyed to the daughter an estate for her sole, separate use, and that, during her life, it was not subject to the debts of the husband.

The words "lawful heirs," and "her heirs forever," in a deed, are words of limitation of the estate to the donee, and not words of purchase for the heirs.

Where personal property is conveyed to the wife and her heirs, for her sole and separate use, and she dies, the husband surviving is entitled to the property, *jure mariti*, in preference to her next of kin.

THE bill in this case was filed by the complainant, to enjoin an execution upon a judgment at law, which had been levied upon some negroes, as the property of Jeremiah B. Warren, and which were claimed by the complainant, who was an infant, and exhibited her bill by *prochein ami*. The title, by which the complainant claimed, will be found stated at length in the opinion delivered in the case.

The defendant, Thomas Freeland, was a near relative of the present Chancellor, and he was, therefore, unable to sit in the trial of the case. Judge Robert Hughes was selected by the parties to preside in his stead.

George S. Yerger, for defendant, in the demurrer.

The only question in this case is, whether the deed of trust or gift, set forth in the bill, conveys the property to the separate use of the wife. The words used are, "in trust for the use and benefit of my daughter, Ann, and her lawful heirs;" and afterwards, the deed concludes, "to hold the same to the proper use and benefit of said Ann." The bill avers, that the husband has had possession of the property, &c.

1. The deed vests the property in the husband. Clancy on Rights, 412, 443; *Duncan and Wife v. Martin*, 7 Yerger, 520; *Harper*

Warren v. Haley, et al.

v. *Coulter*, 2 Porter, 463; 3 How. Rep. 396; — unless the words, “for her use and benefit,” give to her a separate estate.

2. The appointment or conveyance of property to a trustee, will not make it separate property, unless the language of the deed gives it, and this language must be clear, express, and unequivocal. Clancy, 264; *Lund v. Mills*, 5 Ves. 511; Clancy, 262; 2 Story's Eq. 610.

3. It is settled, that the words, “to the proper use and benefit of the wife,” do not give separate property. 2 Story's Eq. 610, and cases cited in notes; *Pulchard v. Ames*, Turner and Russell, 222; *Tyler v. Luke*, 2 Russell and Mylne, 183; ib. 4 Simon's Rep. 144; *Kensington v. Dolland*, 2 Mylne and Keen, 184.

If the words, “to be at her disposal,” had been added, this would have been sufficient, because she could not dispose of it without it was separate property. Clancy, 263.

2. If there was a separate estate in the slaves, they vested in the husband on the wife's death. 7 Johns. Ch. Rep. 229, *Stewart v. Stewart*; 3 How. Rep. 324, *Tourney v. Sinclair*.

John J. Guion, for complainant.

The bill in this case is filed by Ann Emily Warren, by her next friend and guardian, James Warren, to enjoin an execution in favor of the defendant, levying upon a number of slaves, which the complainant claims title to, as the heir of her aunt, Mrs. Joanna B. Warren, deceased. The bill sets forth the fact, that the slaves in question were conveyed by her grandfather, to Thomas Freeland, as trustee of her aunt, Mrs. J. Warren and her heirs; that said Freeland has refused to act as trustee, and, being president of said bank, has directed the levy made in this case, and prays the appointment of a trustee, &c. To this bill there is a general demurrer; and the question for the decision of the Court is, whether the conveyance of John Snodgrass, the grandfather of complainant, of the slaves in question, to Thomas Freeland, for the use of her and her heirs, vested in J. B. Warren, her husband, the absolute title to the property, so as to subject them to execution, for the payment of his debts.

By the complainant it is contended, that the conveyance vested

Warren v. Haley, et al.

in Freeland the title to the slaves for the use of Mrs. Warren, during her life, free and exempt from any right of property in her husband; and that, as sole heir of Mrs. Warren, she is entitled to the property; and, in support of this position, we rely on the following authorities, &c. We contend that the intention of the grantor must prevail, if that intention can be reasonably ascertained from the deed. This principle will not be denied. The grant, it is true, is for the use of Mrs. Warren and her heirs, without any other words of limitation, and it will doubtless be contended by the defendant, that the word *heirs*, is a word of purchase, and not of limitation of the estate to any particular person or object; but we think this view, although a fair construction of a deed to one and his heirs, without words of limitation, under ordinary circumstances, would not apply to this case, in which the father has certainly evinced the intention to convey a separate estate in the property to his daughter, by the intervention of a trustee, in whom he has vested the legal title, for the express purpose, if he had any purpose at all, of preventing the husband from disposing of the property. *Johnson, et al. v. Thompson*, 4 Desaus. Eq. R. 458; *Tucker v. The Executors of Sterns*, 4 Desaus. 532. See also 1 Bing. Rep. 453, where it is held, that the words, "heirs of the body," are held to be words of limitation, and not of purchase; and that the generality of the terms used in a deed will always be restrained for the benefit of children, when the conveyance of property is made with a view to a marriage, or for the benefit of the issue of such marriage — and the authorities cited in the notes. See also 6 Munf. 132 and 581. See also 2 Hawks, case of *Tyson v. Tyson*.

For the contrary doctrine, that the conveyance was absolute, and vested the property in Warren, the husband, absolutely, the defendant relies upon the following authorities: — 2 Story's Eq. 610, and notes; *Pulchard v. Ames*, Turner and Russell, 222, &c. &c. But, I apprehend, that, upon a strict examination of these authorities, they do not fully sustain the position assumed in this case, but only establish the general principle, that the words, "to the use of her and her heirs," in a deed, without any thing else to control or limit the intention of the grantor, would be construed into an absolute grant; but in this case we have the fact, that the property was conveyed

Warren v. Haley, et al.

to a trustee, and the legal title absolutely vested in him; and, if any thing can be inferred from that fact, it is clearly in support of the position, that it was the intention of the grantor to prevent the husband from exercising any ownership over the property, and subjecting it to the payment of his debts; and if this inference is a legal and proper one, to show the intention of the grantor, equity will give it its full force, in favor of the rights of the grantee and her heirs, in opposition to the husband, and those claiming under him.

Robert Hughes, special chancellor.

The complainant filed her bill claiming to be heir of her aunt, Ann Warren, and entitled to the negroes in the bill mentioned under the following bill of sale, or deed of gift, to wit:

"Know all men, that I, John Snodgrass of Claiborne county, and State of Mississippi, for and in consideration of the natural love and affection I bear for my daughter Ann, have given, granted, and delivered, and by these presents, do give, grant, and deliver, unto Thomas Freeland of Claiborne county, and State of Mississippi, in trust, for the use and benefit of my daughter, Ann, and her lawful heirs, the following described negroes, to wit, &c. To have and to hold the said negroes, to the said Thomas Freeland, in trust, for the proper use and benefit of the said Ann, and her heirs forever, &c." The negroes were delivered to Jeremiah B. Warren, at the time husband of said Ann, and by him placed on a plantation in Warren county, held by him, where they remained; Ann the wife, departed this life without issue, and complainant is the only heir of said Ann. The said Jeremiah B. Warren is yet living — judgment obtained against said Jeremiah B. Warren, execution upon which levied on the negroes mentioned in the deed of gift, or some of them. Freeland refuses to execute the trust. The bill prayed for injunction to sale under the judgment, which was granted. There is a demurrer to the bill.

The only question for my determination is, whether the negroes belong to Jeremiah B. Warren, or the complainant. If they are held by Freeland, in trust, for the complainant, they are not subject to the execution levied upon them, but, if the use is in Jeremiah B. Warren, then they are so subject, and the demurrer should be allowed.

Warren v. Haley, et al.

The question is argued on paper by counsel, and it is insisted upon the one side that, by the deed, the negroes in contest are limited to the sole and exclusive use of Mrs. Ann Warren, by the deed of gift, and, consequently, they are not subject to the disposition or control of, or liable to pay the debts of, Jeremiah B. Warren; while on the other hand it is insisted, that the deed of gift gave a use absolutely to Mrs. Warren, which was immediately *jure mariti* vested in her husband, and, consequently, he is entitled to control them, and they are liable under execution to pay his debts. I do not concur with counsel on either side on this point. I have looked into the authorities cited by both counsel, and, with all due deference to their greater ability, I do not see how the question which is made can arise in this case; were Mrs. Ann Warren yet living, and there was a contest between her and the creditors of her husband, then the question would arise, and in that event I am inclined to believe, after a full examination of all the cases, I would be of the opinion, that the deed of gift intended to and did secure to Mrs. Warren an estate for her sole, separate use, and that during her life her husband could not take it, and consequently the creditors of the husband would not be entitled!

The question, however, is presented in an entirely different view. Here an heir, not a child, or the issue of the beneficiary under the deed of gift, is raising the question, and upon her bill the question will have to be decided, as if it was a question between her and the creditors of Jeremiah B. Warren. How, then, would it be in a contest between the complainant and Jeremiah B. Warren? Which would be entitled to the property? These questions are to be answered by an examination of the deed of gift, and by an application of the rules of law to it. The negroes are granted to "Thomas Freeland, in trust, for the use and benefit of my daughter Ann, and her lawful heirs. To have and to hold for the use and benefit of the said Ann, and her heirs forever." Now, what estate in the property is created by these words? The legal estate is vested in Freeland, and an use in fee is created in Ann. The words *lawful heirs, and her heirs forever*, are used in the deed, to show the estate intended to be vested in Ann; they were used as words of limitation of the estate to the donee, and not as words of

Warren v. Haley, et al.

purchase for the heirs. See Reeves's Domestic Relations, 455, *et seq.*

I think the intention of the donor is evident ; he intended, that his daughter should have a fee in the use, and that for her separate use during her life, but here the intention stops ; after her death, the law steps in and disposes of the fee. In ordinary cases, the next of kin, being such as would inherit real estate, are entitled. But between wife deceased, and husband surviving, the rule as to next of kin does not apply. The husband surviving is entitled to the chattels of his wife, not as next of kin, but *jure mariti*. See *Lorry v. Huston*, 3 How. 394, *et seq.*

The husband, Jeremiah B. Warren, therefore, upon the death of his wife, Ann, who was the donee, was entitled to the negroes in contest, and of course they are subject to execution to pay his debts.

The demurrer is allowed, the injunction dissolved, and the bill dismissed.

I N D E X.

A.

ACCOUNT.

1. A court of equity will entertain a bill for discovery, and an account of assets, against an executor or administrator, upon a mere legal claim.
Martin Pleasants & Co. v. Glasscock, et al. 17.
2. C. filed his bill against B., alleging that B. had obtained a judgment at law upon a note, to secure the payment of which he had conveyed B. two negroes, averring that B. had been in possession of one ever since the sale, and prays for an account of hire, and of his value, and for an injunction against the judgment at law; held, that, upon such a bill, no injunction could be obtained. *Craft v. Bullard*, 366.
3. A mortgagor has no right to force the mortgagee to take the property at an assessed value, and cannot call for an account upon any such principle. *Ib.*
4. A mortgagee, who sells a portion of the mortgaged premises, must account for the value of the property sold, and, if for slaves, for their hire. *Ib.*

ACQUIESCEENCE.

Where a vendee comes to the knowledge of a fraud, practised upon him in the sale of property, and afterwards continues, for a series of years, in the use, enjoyment, and occupation thereof, without taking any active measures for redress, or making known any dissatisfaction, until a change of times may have depreciated its value, he can have no relief in equity.

Pintard v. Martin, et al. 126.

ADMISSIONS.

1. Where the bill charged upon the defendant the introduction of negroes into the State for sale, which was positively denied by the answer, and proof in corroboration of the answer taken, held, that proof of mere admissions of the party defendant, that he had so introduced the negroes, would not alone

be sufficient to overthrow the positive denial of the answer and the corroborative proof. *Hope v. Evans, et al.* 195.

2. Proof of mere admissions of a party, unsustained by any other circumstances, should always be cautiously weighed, because of their liability to be misunderstood, the facility of fabricating them, and the difficulty of disproving them. *Ib.*

AGENT.

1. A party who receives from his debtor the note of a third person, as collateral security for his own debt, is bound to use due diligence in collecting it, and if it is lost by any delay of his, he becomes responsible for the amount.

Steger, administrator, v. Bush, et al. 172.

2. A mere delay to prosecute the collection, unaccompanied by consequent loss, will not render the creditor responsible. *Ib.*
3. Where a creditor, having sued upon collateral paper, granted a stay of execution for six months upon the judgment; held, that the stay is not such delay (unless the stay is the occasion of the loss of the debt) as will render the creditor responsible for the amount of the collateral paper. *Ib.*

AGREEMENT.

R., holding a mortgage on T.'s property, agreed to receive some money and take the property back, in discharge of the mortgage; T. paid the money, but refused to deliver the property; held, that the mortgage was not discharged by the agreement. *Robinson v. Thompson, et al.* 454.

ALIMONY.

1. Where, upon the bill of the wife against the husband, a decree "*a vinculo matrimonii*" has been granted, the mere omission in that decree, to provide for the alimony of the wife, cannot affect the wife's right to such a provision at a subsequent time, by a separate and distinct proceeding.

Shotwell v. Shotwell, 51.

2. A circuit court, having decreed a divorce *a vinculo matrimonii*, at the instance of the wife, the superior court of chancery has jurisdiction of a bill by the divorced wife against the husband, to have alimony allotted to her. *Ib.*
3. A decree for alimony results from the decree for a divorce, but is not identical with it, or a necessary part of it. *Ib.*

AMENDMENT.

1. A complainant, making application to amend a sworn bill, after the answer of the defendant is filed, must show that the proposed amendment contains matter important to his rights, and which was unknown to him at the time of filing his original bill, or else he must show a special reason which will excuse him from negligence in the matter. *Everett v. Winn, et al.* 67.

2. Where a decree of sale of property is made, it is generally left to counsel to designate the length of time and mode of publication of the sale; the Court taking care that the notice is reasonable and fair.
Guise v. Middleton, 89.
3. A decree cannot be amended after it is enrolled, in a matter of materiality, unless the record exhibits something to amend by; a mere clerical mistake, or miscalculation, may be amended at any time, when the mistake is apparent on the face of the decree or record. *Ib.*
4. Where a decree, by mistake, required certain property to be advertised for six months, for sale, when it was intended to be advertised for only six weeks, and had been enrolled, the Court refused to amend it. *Ib.*

ANSWER.

Where the original notes given by a mortgagor of a tract of land for the purchase-money are taken up, and new ones substituted instead by the vendee, and the vendor files his bill to enforce his equitable lien, the answer of the vendee, that the new notes were received in satisfaction and discharge of that lien, is not evidence. *The President, Directors, and Company of the Planters Bank of the State of Mississippi v. Edward J. Courtney*, 40.

APPEAL.

An application for an appeal from an interlocutory decree of the chancellor, where money is not required to be paid or property transferred, by the decree, is addressed to the discretion of the chancellor, and will not be granted, if any important principle in the cause remains undecided.

Wright v. Petrie, et al. 326.

APPEARANCE.

1. A mere motion in court to dissolve an injunction granted in a case, is not that formal entry of appearance, which will authorize the complainant to take a *pro confesso* against the party making the motion.
Chowning, et al. v. Nichols, et al. 122.
2. To justify the complainant's taking his bill for confessed, process must either have been served upon the other party, or his appearance, as a defendant to the cause, formally entered of record. *Ib.*
3. There are no regular appearance-days fixed by the rules of this Court; a party desirous of entering his appearance can do so at any time while the Court is in session, by making his application, and having it entered of record. *Ib.*

ASSIGNMENT.

1. A corporate body can make an assignment of its property in trust, for the payment of its just debts, preserving to each creditor the right of sharing equally, according to the amount of his claim.

Robins, et al. v. Embry, et al. 207.

INDEX.

2. The property of a banking corporation is a trust-fund for all its creditors; and in an assignment by such a corporation, if a preference in favor of the debts due to any particular creditor, or set of creditors, is given, the assignment will be void. *Sed quare. Ib.*
3. The creditors of a corporate body can enforce their claims against any of the property of the incorporation in the hands of persons affected with a knowledge of its corporate character. *Ib.*
4. It is essential to the validity of an assignment, by an incorporation, that the assignor, by the assignment, part absolutely with all title to the property, and all authority to control it, free from all restrictions that will unnecessarily delay creditors; there must be no reservation, for the assignor's benefit, except of the surplus; no authority given to control or direct the assignees; and all the uses must be expressly declared; where any of these objections exist, the assignment will be void. *Ib.*
5. A banking company, to which a railroad was by its charter affixed, having nearly completed the road and exhausted its means, being compelled to make an assignment for the benefit of its creditors, and the period for completing the road allowed by the charter of the company having nearly expired, the expiration of which without the completion of the road would cause a forfeiture of the charter, and the road in its then condition being comparatively worthless, and its not being completed would be a total loss to the company of the amount expended, and would, if not destroy, greatly diminish, the ability of the company to meet its debts; *held*, that a provision in the deed of assignment, authorizing the assignees to borrow \$250,000 to complete the road, and pledging the assets of the company and the profits of the road for the payment of that sum when borrowed, before any of the other debts were paid, did not vitiate the assignment. *Ib.*
6. If an assignment be otherwise free from the imputation of fraud, it is not vitiated by being made in part to secure anticipated advances, especially where those advances are in aid of the general purposes of the assignment. *Ib.*
7. A banking corporation, with a railroad annexed, in making assignment of its effects to assignees to pay its debts, assigned to the assignees the power of managing and controlling the railroad; *held*, that this provision of the assignment, merely assigned the profits of the road, with the temporary control of the road to the assignees, for the benefit of the creditors, and did not vitiate the assignment. *Ib.*
8. In such case, if the charter had required a committee of the directory to manage the road, an assignment by the directory of the management of the road to others than a committee of the directory, would be a matter between the directors and stockholders, or the latter and the government, and could not be questioned by another person. *Ib.*
9. A provision in a deed of assignment by a corporation, that the directory should have power to appoint new trustees to fill any vacancy that may

- occur by death or otherwise, is not a reservation that will vitiate the assignment. *Ib.*
10. Where, by an assignment for the benefit of creditors, twelve months were allowed to collect the debts, and convert into money, the property of the assignor, before distribution among the creditors; the debts being numerous, and widely scattered over the country, and the creditors of the assignor residing at distant places; *held*, that the time allowed was not unreasonable, and would not render the assignment void. *Ib.*
11. Where an assignment is made by a bank of its effects to pay its debts, at a period of great pecuniary embarrassment and general insolvency, and power is given by the assignment to the assignees to compromise with the debtors of the bank in such manner as would be in the judgment of the assignees, "to the interest of the creditors of said bank;" *held*, that the assignment was not vitiated by such a provision, and the power might be exercised. *Ib.*
12. Where a bank, with a railroad attached, in an assignment of its effects, made the assignees the joint agents of the bank and its creditors; in the management of the road, the agents of the bank, and in the receipt and disbursement of its profits, the agents of the creditors; *held*, that the provision in the assignment gave the bank no control over the assignees, and did not avoid the assignment. *Ib.*
13. A railroad built by an incorporated company, for public travel and transportation, is a mere *franchise*, and not assignable by the company. *Ib.*
14. In an assignment by a bank of its effects, a provision prohibiting the assignees from paying any claims, until their validity has been treated in a mode pointed out in the assignment; *held*, not to avoid the assignment. *Ib.*
15. Where, in a deed of assignment of its property, a bank conveyed in general words all its effects; *held*, that the omission to annex a schedule of the property assigned, is no objection to the validity of the assignment. *Ib.*
16. In a deed of assignment by a bank, a covenant on the part of the assignees, to exhibit periodically a statement of their accounts to the board of directors, is no objection to the validity of the assignment. *Ib.*
17. Where a deed of assignment by an incorporation of its effects for the payment of its debts, is void in part, it is void in *toto*. *Ib.*
18. A provision in a deed of assignment, by a bank, requiring the assignees "to pay all the necessary expenses of the President, Directors, and Company of the bank, in the management of the corporation;" *held*, not to be such a reservation for the benefit of the grantor, as will make the assignment void upon its face; the fund assigned for the payment of the debts, being not only of a limited and definite amount, but also of an indefinite assignment of annually accruing profits; and the reservation not appearing to be for any fraudulent purpose. *Ib.*
19. A corporation is trustee for the creditors; and where a transfer of its

INDEX.

property is made without valid consideration, they may pursue the property, and force the assignee thereof to account for it.

Wright, et al. v. Petrie, et al. 282.

ASSIGNOR AND ASSIGNEE.

1. An assignee of a note, who has parted with all his right in it, and has no interest in the matters in controversy, and against whom no relief or discovery is prayed; *held*, on demurrer, not to be a necessary party to the bill.

Everett v. Winn, et al. 67.

2. A court of equity will subject the *choses in action* of a debtor, in the hands of a voluntary assignee, to the payment of the debt of a judgment creditor.

Wright, et al. v. Petrie, et al. 282.

3. P., about to trade with D. for the note of H., went to H. to inquire if the note was good. H. answered it was good, and would be paid at maturity; P. thereupon traded for the note, and afterwards assigned it to J. (informing him of H.'s statement), who sued thereon; *held*, that H. was precluded, by the representations made to P., from setting up as a defence to the suit by J. any failure of consideration between himself and D., the original holder of the note.

Hamer, et al. v. Johnston, et al.; Marshall v. Morton, et al. 563.

ATTACHMENT.

1. Where by statute a judgment creditor, who has run his execution without effect, can, by garnishment at law, bring in the debtors of his judgment debtor, and divert their debts to the satisfaction of his own; a court of equity will, by analogy to the proceedings at law, under similar circumstances, adopt a similar rule. *Wright, et al. v. Shelton, et al.* 282.
2. The lien of an attachment commences and takes effect from the time of the levy, and not from the time of issuing the attachment.

Mears and Walker v. Winslow, et al. 449.

B.

BILL OF SALE.

- C. conveyed two negroes to B., by a bill of sale absolute and unconditional upon its face; *held*, that it was competent for C. to prove, by parol, that the bill of sale was intended as a mere mortgage, to secure B. a sum of money.

Craft v. Bullard, 366.

BILL OF REVIEW.

1. A court of mere errors and appeals cannot take original cognizance of a bill of review. *Mercer, administrator, v. Stark,* 479.

2. A bill of review can only be filed in the court in which the original decree sought to be reviewed was made. *Ib.*
3. If a bill of review is sustained, in a case which, when decided, was ready for final hearing, but in which the Court erred in rendering the decree, merely, the whole case is not thereby reopened, but the Court will only correct the error in the decree, so as to make it conform to the law. *Ib.*
4. If a bill of review is sustained, because the case, when submitted, was not in a proper attitude for final hearing, then the whole case is open for reexamination. *Ib.*

BILL OF EXCHANGE AND PROMISSORY NOTE.

1. An assignor of a note, who has parted with all his right in it, and has no interest in the matters in controversy, and against whom no relief or discovery is prayed; *held*, on demurrer, not to be a necessary party to the bill. *Everett v. Winn, et al.* 67.
2. It is a valid defence to an action upon a promissory note against the maker that the note belonged to a deceased person's estate, and that the plaintiff received it in payment of an individual debt of the administrator. *Cotton v. Parker, administratrix*, 191.
3. *Quare*. Would the same rule apply, if the note were payable on its face, to the administrator of the deceased's estate? *Ib.*
4. A., having purchased property at an administrator's sale of the effects of B., cannot, when B.'s estate is insolvent, buy up the notes of B. to offset them against his debt to the administrator. *Ib.*
5. G. G. bought slaves of N., which were introduced into this State and sold, in violation of law; and, to secure the purchase-money, executed a deed of trust on land, and afterwards sold the land to C. G., which was again sold, under the deed of trust to N., at which sale, also, C. G. became the purchaser, and executed his note to N. for the purchase-money, and gave a deed of trust to secure their payment; N. attempted to sell under the deed of trust, and was enjoined by C. G., on the ground that this debt to N. was the assumption by him of the debt of G. G.; *held*, that the illegality of the consideration of the notes of G. G. did not attach to the notes given by C. G., and that N. was entitled to sell under the deed of trust. *Gibson's heirs v. Niblet, et al.* 278.
6. When notes are given, and a deed of trust executed to secure their payment, it is no ground for enjoining a sale under the deed of trust, that a suit at law is pending upon the notes, in which their validity is questioned. *Ib.*
7. J. H. executed a note, with W. H. as his surety, to L. M. & Co.; and, to indemnify W. H., J. H. conveyed property in trust to G.; L. M. & Co. transferred the note to D., who, J. H. becoming insolvent, filed a bill to subject the property conveyed in trust to G., to the satisfaction of his debt; *held*, that the trust-property was liable in equity to the payment of the note in the hands of the assignee. *Dick, et al. v. Truly, et al.* 557.
8. P., about to trade with D. for the note of H., went to H., to inquire if the

- note was good. H. answered that it was good, and would be paid at maturity; P. thereupon traded for the note, afterward assigned it to J. (informing him of H.'s statement), who sued H. thereon; *held*, that H. was precluded, by the representations made to P., from setting up as a defence to the suit by J., any failure of consideration between himself and D., the original holder of the note. *Hamer, et al. v. Johnston, et al.*; *Marshall v. Morton, et al.* 563.
9. Where a note, made for discount at a bank, is made payable to the banking company, and is signed by J., as principal, and H. and others, as surety, and the bank refuses to discount it, and the note is afterwards passed to W. in payment of the debts of some third person, neither principal nor surety to the note; and without their assent, W. having full knowledge of the object of the creation of the note; *held*, that the note, in the hands of W., was not obligatory upon the surety. *Herring v. Winans, et al.* 466.
10. Where a note is payable to a banking company, and is taken by W., without indorsement from the payees, W. is affected by all the equities of the makers of the note. *Ib.*

BOND FOR TITLE.

H. bought land of P. and L., and gave his notes for the purchase-money, and took their bond for title. H. did not pay his notes when due, and P. and L. sold the land to B. and M., who had knowledge of the prior sale to H. H. filed his bill, offering to pay the notes, and demanding title; *held*, that H. was entitled to the land upon the payment of the notes, and that B. and M. held the legal title for the benefit of H. *Hines v. Baine, et al.* 530.

BOND OF INDEMNITY.

F. and I. entered into partnership to transact the mercantile business. F. sold out to I., and I. gave F. a bond of indemnity, with surety, conditioned, to pay all the liabilities of the firm. I. died insolvent, without any legal representative, and leaving the debts unpaid. F. filed a bill against the sureties in the indemnity bond, to compel them to a specific performance of their contract; *held*, on demurrer to the bill, that the Court could not grant the relief asked, and decree a specific performance of such a contract.

Foote, et al. v. Garland, et al. 95.

C.

CESTUI QUE TRUST.

A person for whose benefit a trust is created without his knowledge, may afterwards affirm it, and enforce its execution.

Martin Pleasants & Co. v. Glasscock, et al. 17.

CHOSES IN ACTION.

1. A court of equity will subject the *chooses in action* of a debtor, in the hands

of a voluntary assignee, to the payment of the debt of a judgment creditor
Wright, et al. v. Petrie, et al. 282.

2. The interest of a mere mortgagee, is in the nature of a *chose in action*, and cannot, therefore, be seized and sold under an execution at law.

Boisgerard, et al. v. Wall, 404.

CIRCUIT COURT.

1. The jurisdiction of circuit courts in the foreclosure of mortgages, is concurrent and coextensive with that of the Superior Court of Chancery.

Tooley v. Kane, et al. 518.

2. If it should become necessary to file an original bill to enforce a decree for the foreclosure of a mortgage, rendered by the Circuit Court, that Court would have jurisdiction to entertain such a bill, as incident to its power to decree a foreclosure. *Ib.*

See Mortgage, 26. JURISDICTION, 21.

CIRCUIT JUDGE.

The statute authorizing circuit judges to grant injunctions, "within their respective circuits," limits their power to cases which have originated within the districts over which their jurisdiction extends; and an injunction in a case originating, and to operate beyond this district, granted by a circuit judge, is void. *Montgomery, et al. v. Bank of Rodney, et al.* 632.

COMMISSIONER.

1. A commission is not necessary, under the present practice of this Court, to take depositions, they can be taken on notice.

Gordon, sen. v. Watkins, et al. 37.

2. A commissioner in chancery, to effect a sale by the Court, has no authority or power to substitute one purchaser for another, without the entire assent of the first purchaser. *Vannerson v. Cord, et al.* 345.

3. Where a commissioner makes a sale of mortgaged premises, and the purchaser fails to comply with the precedent requirements of the decree, the commissioner has no authority to receive a bond from another person of the amount of the purchaser's bid; but the property remains in his hands, as if no sale had taken place. *Ib.*

4. A commissioner, having advertised the property for sale, upon a failure from any cause to sell on the appointed day, has power, unless his authority is restricted by the decree on its face, or limited to a single specified time, to advertise the property for sale again and again, until he effectuates the object of his appointment. *Ib.*

5. The powers of a commissioner to sell property by decree of the Chancery Court, are precisely the same that a sheriff has, when a writ of *fieri facias* is placed in his hands. *Ib.*

6. D. filed her bill, claiming a large sum to be due from R.'s intestate, V. (for

whom D. had once been guardian), for sums expended for V. while she was her ward. An interlocutory decree for an account was ordered, and the commissioner reported a large balance to be due D., for the care of V., not only while the relation of guardian and ward existed, but for a period long anterior to that time; which report, although excepted to by both parties, was confirmed, without disposing of the exceptions; held, upon final hearing of the cause, that the report of the commissioner was not *res adjudicata* by the order of confirmation, but was under the control of the Court, and should be set aside and cancelled for irregularity. *Davis v. Roberts*, 543.

7. An interlocutory decree for an account is always under the control of the Court, and may, under peculiar views, even after confirmation of the report by a commissioner, taking an account under the decree, be reviewed and set aside. *Ib.*
8. A sale of mortgaged premises by a commissioner, is a sale by the Court, and is not complete, or title passed thereby, until a report thereof is made to the Court, and that report confirmed. *Tooley v. Kane, et al.* 518.
9. In case of any error in the proceedings in a commissioner's sale, the Court will, even after confirmation of the report, set aside the confirmation, and rectify the evil; and if necessary, upon petition, order a resale. *Ib.*

CONSIDERATION.

1. Money paid upon an illegal consideration, cannot be recovered back. *Rowan & Harris v. Adams, et al.* 45.
2. R. & H. introduced negroes into this State since the first of May, 1833, as merchandise, and for sale, and sold them to R., and took in payment for them the notes of A., payable to H. G. R., and by H. G. R. indorsed, secured by mortgage on a tract of land; held, upon this state of fact, that R. & H. were entitled to foreclose the mortgage given by A., and assigned in payment of the illegal consideration by H. G. R. to R. & H. *Ib.*
3. A vendee, having purchased negroes, introduced into this State in violation of the constitution, cannot, in a court of equity, escape the payment of the purchase-money, without offering to surrender back the slaves, and account for their hire. *Ib.*
4. Taking property in payment of a pre-existing debt, does not make the buyer a purchaser for valuable consideration, in the eye of the law, as against one holding a prior equity. *Ib.*
5. A party having a valid defence to a portion of the amount of a judgment at law against him, cannot have an injunction for the whole amount of the judgment. *Commissioners of the Sinking Fund v. Patrick, et al.* 110.
6. G. sold B. & W. negroes, introduced into this State in violation of law; B. & W. executed a note in payment, which M. indorsed; G. sued B. & W. at law upon the note, and they set up the illegality of the consideration of the note, and were discharged. G., at the same time, sued M. the indorser, who, being ignorant of the consideration of the note, made no defence, and

judgment was had against him. M. exhibited his bill, setting forth these facts, and praying for a perpetual injunction against the judgment at law; held, that M. was entitled to the relief asked, and that the injunction should be perpetually enjoined. *Miller v. Gaskins*, 524.

CONTRACTS.

1. Where a vendee takes from his vendor such title only as the vendor had, he cannot afterwards, for mere defect in title, obtain a rescission of the contract. *Pintard v. Martin, et al.* 126.
2. Where a vendee comes to the knowledge of a fraud practised upon him in the sale of property, and afterwards continues for a series of years in the use, enjoyment, and occupation thereof, without taking any active measures for redress, or making known any dissatisfaction, until a change of times may have depreciated its value, he can have no relief in equity. *Ib.*
3. Where a party, having knowledge that he has been defrauded, proceeds to do acts in confirmation of his contract, by voluntarily entering into a new engagement concerning it, he will be held thereby to have waived the fraud, and to have renounced that relief, which he might afterwards have had in equity. *Ib.*
4. Fraud may be inferred from facts and circumstances, such as the nature of the contract, and the relation and circumstances of the parties.
Pope v. Andrews, et al. 135.
5. A party, who receives from his debtor the note of a third person as collateral security for his own debt, is bound to use due diligence in collecting it, and if it is lost, by any delay of his, he becomes responsible for the amount,
Steger, administrator, v. Bush, et al. 172.
6. A mere delay to prosecute the collection, unaccompanied by consequent loss, will not render the creditor responsible. *Ib.*
7. Where a creditor, having sued upon collateral paper, granted a stay of execution for six months upon the judgment; held, that the stay is not such delay (unless the stay is the occasion of the loss of the debt) as will render the creditor responsible for the amount of the collateral paper. *Ib.*
8. Where a party has knowingly entered into an illegal contract, and has voluntarily made payment therein, he has no claim, either in law or equity, to recover back the money expended. *Hope v. Evans, et al.* 195.
9. E. sold H. a tract of land and negroes, some of the latter of which had been brought into this State in violation of law, for sale. H. made partial payment, and filed his bill to rescind the contract of sale, which he averred was an entire one, on account of illegality; held, that H. was entitled to no relief; that the Court would not decree a repayment of the money already paid, and would not decree a partial rescission of the contract. *Ib.*
10. To discharge one party to a contract, on the ground of the failure of the other to perform his part, such failure must be clearly established by full, direct, and satisfactory evidence.
Wright, et al. v. Petrie, et al. 282.

11. P. contracted to build a railroad for the Brandon Bank at a stipulated price, and, receiving money from the bank for that purpose, executed a mortgage to secure its proper application; P. abandoned the work before its completion, and while the bank was in advance of money to P.; the bank being in embarrassed and failing circumstances, without valid consideration, voluntarily released the mortgage, and discharged P. from the debt; *held*, that the release of the mortgage, and the discharge of the debt, were fraudulent and void as to the judgment creditors of the bank. *Ib.*
12. In forming an estimate of the damages sustained by one party for the failure of the other to perform a contract between them, the possible profits of money, or the amount saved to the other, are not proper criteria. *Ib.*
13. P. being about to construct a railroad for an incorporated company, which was to make advances of money for that purpose, executed a mortgage to the company, to indemnify them against any loss by reason of his failure to comply with his contract; P., at a time when the company were largely in advance to him beyond the amount expended, abandoned his contract; *held*, that as to the sum so in advance by the company, the damages sustained by them would be considered as liquidated, and so far the mortgage and damages would be subject, in equity, to a judgment creditor of the company, seeking to subject them as equitable assets.

Wright, et al. v. Petrie, et al. 282.

14. In a contract between a company and an individual, wherein the latter agreed to build a railroad for the former, and the former agreed to pay the latter in instalments, as the work progressed; *held*, that the latter would be entitled to recover a ratable portion of the money for the ratable performance of the work. *Ib.*
15. Where one party abandons a contract, with the consent of the other, which he has undertaken, that consent would bind the other to pay for that portion of the contract actually accomplished. *Ib.*
16. A rescission of a contract, on account of alleged defect of title, will not be granted, where, at the hearing of the case, it is apparent a perfect title may be had, and no fraud is alleged or proved.

Fletcher v. Wilson, et al. 376.

17. As a general rule, a court of equity will not rescind a contract for mere defect of title, where the vendor has been guilty of no fraud, mistake, or misrepresentations, unless, at the time of the decree, it appears that the vendor is totally unable to make title, and there is no adequate remedy at law. *Ib.*
18. Time is never important in equity, unless made so by the very terms of the contract, or is necessarily so from the very nature of the property about which the contract is made. *Ib.*
19. A vendee, discovering a defect in his title, should at once, if he designs doing so at all, surrender the possession of the property, and demand a rescission, and his neglect to do so, is a waiver of his right to a rescission. *A.*

20. Where, by a contract of sale of real estate, part of the purchase-money was to be paid down, and the remainder in instalments, secured by deed of trust, before the property is to be delivered, and only a portion of the cash payment is made, and the property is delivered, and the deed of trusts for the instalments taken ; *held*, that the vendor has no equitable lien upon the land sold, for the unpaid portion of the purchase-money, agreed to be paid in cash. *Phillips v. Saunderson, et al.* 462.
21. S. contracted with P. and others, to do a piece of work, for a certain agreed price, and receive his pay in the notes of a certain bank, or their equivalent, the price agreed to be paid being but a fair compensation for the labor to be done ; before the work was completed, the notes of the bank agreed upon, depreciated to be worth but one tenth of their value at the time of the contract ; S. filed his bill to enforce the payment in good money of the debt due him, which P. and others resisted, and claimed the right to pay in the notes agreed on ; *held*, that the great depreciation of the notes agreed on, was a circumstance not looked to, or provided for by either party, and that it would be inequitable to force S. to receive them, and that he was entitled to recover a fair price for the work done, in current money.

Sample v. Pickens, et al. 501.

22. H. bought land of P. & L. and gave his notes for the purchase-money, and took their bond for title ; H. did not pay his notes when due, and P. & L. sold the land to B. & M., who had knowledge of the title-sale to H. H. filed his bill, offering to pay the notes, and demanding title ; *held*, that H. was entitled to the land upon the payment of the notes, and that B. & M. held the legal title for the benefit of H. *Hines v. Baine, et al.* 530.

CORPORATION.

1. A corporate body can make an assignment of its property, in trust, for the payment of its just debts, preserving to each creditor the right of sharing equally, according to the amount of his claim.
Robins, et al. v. Embry, et al. 207.
2. The property of a banking corporation is a trust-fund for all its creditors ; and in an assignment by such a corporation, if a preference in favor of the debts due to any particular creditor, or set of creditors, is given, the assignment will be void. *Sed quærre. Ib.*
3. Banking corporations are trustees not only for the stockholders, but also for the creditors, who have a prior and paramount equity. *Ib.*
4. The creditors of a corporate body can enforce their claims against any of the property of the incorporation in the hands of persons affected with knowledge of its corporate character. *Ib.*
5. It is essential to the validity of an assignment by an incorporation, that the assignor, by the assignment, part absolutely with all title to the property, and all authority to control it, free from all restrictions, that will unnecessarily delay creditors ; there must be no restrictions for the assignor's benefit, except of the surplus ; no authority given to control or direct the assignees ;

and all the uses must be expressly declared ; where any of these objections exist, the assignment will be void. *Ib.*

6. A banking company, to which a railroad was by its charter affixed, having nearly completed the road, and exhausted its means, being compelled to make an assignment for the benefit of its creditors, and the period for completing the road, allowed by the charter of the company, having nearly expired, the expiration of which, without the completion of the road, would cause a forfeiture of the charter, and the road in its then condition being comparatively worthless, its not being completed would be a total loss to the company of the amount expended, and would, if not destroy, greatly diminish, the ability of the company to meet its debts ; *held*, that a provision in the deed of assignment, authorizing the assignees to borrow two hundred and fifty thousand dollars to complete the road, and pledging the assets of the company, and the profits of the road, for the payment of that sum when borrowed, before any of the other debts were paid, did not vitiate the assignment. *Ib.*
7. If an assignment be otherwise free from the imputation of fraud, it is not vitiated by being made in part to secure anticipated advances, especially where those advances are in aid of the general purposes of the assignment. *Ib.*
8. A banking corporation, with a railroad annexed, in making an assignment of its effects to assignees to pay its debts, assigned to the assignees the power of managing and controlling the railroad ; *held*, that this provision of the assignment, merely assigned the profits of the road, with the temporary control of the road to the assignees, for the benefit of the creditors, and did not vitiate the assignment. *Ib.*
9. In such case, if the charter had required a committee of the directory to manage the road, an assignment by the directory of the management of the road to others than a committee of the directory, would be a matter between the directors and stockholders, or the latter and the government, and could not be questioned by another person. *Ib.*
10. A provision in a deed of assignment by a corporation, that the directory should have power to appoint new trustees to fill any vacancy that may occur, by death or otherwise, is not a reservation that will vitiate the assignment. *Ib.*
11. Where, by an assignment for the benefit of creditors, twelve months were allowed to collect the debts, and convert into money the property of the assignor, before distribution among the creditors ; the debts being numerous and widely scattered over the country, and the creditors of the assignor residing at distant places ; *held*, that the time allowed was not unreasonable, and would not render the assignment void. *Ib.*
12. Where assignment is made by a bank of its effects to pay its debts, at a period of great pecuniary embarrassment and general insolvency, and power is given by the assignment to the assignees to compromise with the debtors of the bank, in such manner as would be, in the judgment of the assignees,

- "to the interest of the creditors of said bank;" *held*, that the assignment was not vitiated by such a provision, and the power might be exercised. *Ib.*
13. Where a bank, with a railroad attached, in an assignment of its effects, made the assignees the joint agents of the bank and its creditors; in the management of the road, the agents of the bank, and in the receipt and disbursement of its profits, the agents of the creditors; *held*, that the provision in the assignment gave the bank no control over the assignees, and did not avoid the assignment. *Ib.*
14. In an assignment by a bank of its effects by a provision, prohibiting the assignees from paying any claims until their validity has been tested in a mode pointed out in the assignment; *held*, not to avoid the assignment. *Ib.*
15. Where, in a deed of assignment of its property, a bank conveyed, in general words, all its effects; *held*, that the omission to annex a schedule of the property assigned, is no objection to the validity of the assignment. *Ib.*
16. In a deed of assignment by a bank, a covenant on the part of the assignees to exhibit, periodically, a statement of their accounts to the board of directors, is no objection to the validity of the assignment. *Ib.*
17. Where a deed of assignment by an incorporation of its effects, for the payment of its debts, is void in part, it is void *in toto*. *Ib.*
18. A provision in a deed of assignment by a bank, requiring the assignees "to pay all the necessary expenses of president, directors, and company of the bank, in the management of the corporation;" *held*, not to be such a reservation for the benefit of the grantor, as will make the assignment void upon its face; the fund assigned for the payment of the debts being not only a limited and definite amount, but also of an indefinite assignment of annually accruing profits; and the reservation not appearing to be for any fraudulent purpose. *Ib.*
19. In a contract between a company and an individual, wherein the latter agreed to build a railroad for the former, and the former agreed to pay the latter in instalments, as the work progressed; *held*, that the latter would be entitled to recover a ratable portion of the money, for the ratable performance of the work. *Wright, et al. v. Petrie, et al.* 282.
20. A banking corporation has power to make an assignment of its effects for the benefit of its creditors, to trustees, and such an assignment will be upheld in equity. *Montgomery, et al. v. The Commercial Bank of Rodney*, 632.
21. The legislature of Mississippi, in the year 1840, passed an act, declaring that "no bank in this State shall transfer, by indorsement or otherwise, any note, bill receivable, or other evidence of debt;" *held*, that this act did not take away from a bank, in failing circumstances, the right to make a general assignment of its effects for the benefit of its creditors. *Ib.*
22. Is not a law, prohibiting corporations from the performance of acts not prohibited by the charter, and not extending the prohibition to individuals, unconstitutional? *Quare. Ib.*

INDEX.

COSTS.

Where a party, buying land, agreed to make a cash payment in part, to secure the remainder of the purchase-money by deed of trust on the land purchased, and when the sale was consummated, paid only a portion of the proposed cash payment, and the vendor filed a bill in equity, to enforce a supposed equitable lien for that unpaid portion; held, although the complainant was not entitled to the relief asked, yet his bill shall be dismissed at the cost of the vendee, who occasioned the injury.

Phillips v. Sanderson, et al. 462.

COVENANT.

1. A covenant of general warranty, binding the grantor and his heirs in a deed of bargain and sale of real estate, is a real covenant running with the land, and enures to the benefit of all subsequent purchasers.

Torrey v. Minor, et al. 489.

2. S. G. sold by deed of warranty, binding himself and heirs, a tract of land to M., who intermarried with A. G., one of the heirs of S. G. M. alienated the land, and died; his widow applied for dower in the land so sold to her husband; held, that she was not entitled to dower therein. *Ib.*
3. Where covenants are mutual and dependent, and have been violated by one party thereto, and the other desires to absolve himself therefrom, he must offer to comply fully with his part of the contract, before he can do so.

Hines v. Baine, et al. 530.

4. Where an administrator sells property of his intestate, there is an implied covenant with the purchaser, that he has authority to sell.

Crisman, et al. v Beasley, administrator, 561.

COURT OF CHANCERY.

1. A court of chancery has jurisdiction to decree a cancellation of a tax collector's deed, in a proper case. *Bacon, et al. v Conn,* 348.
2. Where a judgment has been obtained against the representatives of a deceased person, and the estate of the deceased has been represented insolvent to the probate court, it is irregular under the statute (How. and Hutch. 410) to sue out an execution upon such judgment against the estate, and a court of chancery will enjoin it. *Neiber's administrators v. Wilkes,* 599.
3. By the constitution of Mississippi, "a separate superior court of chancery" is created, "with full jurisdiction in all matters of equity;" it is provided, that the "chancellor shall be elected by the qualified electors of the whole State, for the term of six years, and shall be at least thirty years old at the time of his election;" the legislature afterwards passed a law, providing for the appointment of a special chancellor, by selection of the parties litigant, or by lot (if they could not agree), to sit in the trial of any case where the

chancellor, from interest or other cause, was disqualified from trying the case; *held*, that the act of the legislature was not unconstitutional.

Montgomery, et al. v. Bank of Rodney, 632.

CREDITORS.

1. A creditor of the estate of a deceased person cannot come into equity to subject to the satisfaction of his debt, property of the decedent in the hands of a third person, who has intermeddled with, and possessed himself thereof.
Martin Pleasants & Co. v. Glasscock, et al. 17.
2. In such case, the creditor has a plain, adequate, and unembarrassed remedy at law. *Ib.*
3. A person, for whose benefit a trust is created without his knowledge, may afterwards affirm it, and enforce its execution. *Ib.*
4. A sale, by one greatly in debt, and whose every means were more than demanded to meet his immediate and pressing wants, of his property, on a credit of nine, ten, and eleven years, is made "with intention to hinder, delay, and defraud creditors." *Pope v. Andrews, et al.* 135.
5. If a vendor make a fraudulent sale of his property, to avoid the payment of his debts, to a vendee ignorant of the fraud of the vendor, the vendee will be protected as a purchaser for valuable consideration. *Ib.*
6. Where a creditor, having sued upon collateral paper, granted a stay of execution for six months upon the judgment; *held*, that the stay is not such delay (unless the stay is the occasion of the loss of the debt) as will render the creditor responsible for the amount of the collateral paper.
Steger, administrator, v. Bush, et al. 172.
7. The property of a banking corporation is a trust-fund for all its creditors; and, in an assignment by such corporation, if a preference in favor of the debts due to any particular creditor, or set of creditors, is given, the assignment will be void. *Sed quare. Robins, et al. v. Embry, et al.* 207.
8. Banking corporations are trustees, not only for the stockholders, but also for the creditors, who have a prior and paramount equity. *Ib.*
9. The creditors of a corporate body can enforce their claims against any of the property of the incorporation, in the hands of persons affected with a knowledge of its corporate character. *Ib.*
10. P. contracted to build a railroad for the Brandon Bank, at a stipulated price; and, receiving money from the bank for that purpose, executed a mortgage to secure its proper application. P. abandoned the work before its completion, and while the bank was in advance of money to P.; the bank, being in embarrassed and failing circumstances, without valid consideration, voluntarily released the mortgage, and discharged P. from the debt; *held*, that the release of the mortgage, and the discharge of the debt, were fraudulent and void, as to the judgment creditors of the bank.
Wright, et al. v. Petrie, et al. 282.
11. A corporation is trustee for the creditors; and, where a transfer of its

- property is made without valid consideration, they may pursue the property, and force the assignee thereof to account for it. *Ia*
12. A court of equity will subject the choses in action of a debtor, in the hands of a voluntary assignee, to the payment of the debt of a judgment creditor. *Wright, et al. v. Petrie, et al.* 282.
13. P., being about to construct a railroad for an incorporated company, which was to make advances of money for that purpose, executed a mortgage to the company, to indemnify them against any loss by reason of his failure to comply with his contract: P., at a time when the company was largely in advance to him beyond the amount expended, abandoned his contract; *held*, that, as to the sum so in advance by the company, the damages sustained by them would be considered as liquidated; and, so far, the mortgage and damages would be subject, in equity, to a judgment creditor of the company seeking to subject them as equitable assets. *Ib.*
14. Where a judgment creditor has his execution returned "nulla bona," but afterwards levies the same on personal property, in which the defendant in the execution has merely an equitable interest, and, pending the levy, files his bill in the court of chancery, to subject the equitable interest of the defendant to the payment of his judgment debt; *held*, that the right of the complainant to the equitable relief, was established by the return of "nulla bona," and was not disproved by the levy upon property not subject to sale under execution. *Ib.*
15. Where a bill of exchange was taken by a judgment creditor from his debtor, the amount of which, if paid, was to be credited on the judgment, and the bill was not paid; *held*, on a bill filed by the judgment debtor to enjoin so much of the judgment at law, that the judgment creditor must either credit the judgment, or deliver back the bill of exchange.

Newman v. Meek, 331.

16. Where debts due to a partnership, in five, ten, and fifteen years, the creditors of the partnership could not have any more summary remedy on the mortgages, than the partners themselves would have.

Boisgerard, et al. v. Wall, 404.

17. Where each partner executes a mortgage to the partnership, for the purpose of "binding and rendering himself liable to pay the" partnership debts, and, in the condition of the mortgage, recites, that the mortgage is to be discharged, when the liabilities of the partnership are all paid; *held*, that one of the objects of the mortgage was, to secure the payments of the debts of the partnership. *Ib.*

CROSS-BILL.

1. Persons not parties, defendants to the original bill, have no right to file a cross-bill in the case; but, where the complainants elect to treat such proceedings as a cross-bill, by answering it, it will not be dismissed on motion, before the final hearing. *Payne v. Cowan, et al.* 26.

2. Whether, in such case, any decree can be given upon such bill, at the final hearing. *Quærer.* *Ib.*
3. A defendant, in his cross-bill against the complainant, cannot introduce new and distinct subjects of litigation, from those which are in controversy in the original suit. *Fletcher v. Wilson, et al.* 376.
4. A defendant to a bill, having any right in the property in controversy, not noticed in the original bill, may assert that right by way of cross-bill. *Ib.*

D.

DAMAGES.

1. In forming an estimate of damages sustained by one party, for the failure of the other to perform a contract between them, the possible profits of the one, or the amount possibly saved to the other, are not proper criteria. *Wright, et al. v. Petrie, et al.* 282.
2. P., being about to construct a railroad for an incorporated company, which was to make advances of money for that purpose, executed a mortgage to the company, to indemnify them against any loss by reason of his failure to comply with his contract. P., at a time when the company were largely in advance to him beyond the amount expended, abandoned his contract; held, that, as to the sum so in advance by the company, the damages sustained by them would be considered as liquidated, and so far the mortgage and damages would be subject in equity to a judgment creditor of the company, seeking to subject them as equitable assets. *Ib.*

DANCING RABBIT CREEK TREATY.

1. The refusal of the agent of the United States, residing with the Indians, to register the application of the Indians claiming under the 14th Art. of the Dancing Rabbit Creek treaty, does not affect the validity of the claims and application of such Indians. *Heirs of Charles Land v. Heirs of Thomas Land,* 158.
2. The right of the head of a Choctaw family to a reservation under the 14th Art. of the Dancing Rabbit Creek treaty, vested whenever such Choctaw signified his intention to the agent of the United States, of becoming a citizen of the State, and that right became complete whenever a residence on the land, for five years subsequent to the ratification of the treaty, was accomplished. *Ib.*
3. Under the 14th Art. of the Dancing Rabbit Creek treaty, granting reservations of land to the head of each Choctaw family, and to each of his children, the treaty intended to secure to the head of the family only one section, and to each of the children the amounts stipulated by the treaty; held, therefore, that the bill of a Choctaw Indian, setting up title in himself to the portion of land reserved for his children, must be dismissed.

Pickens v. Harper, et al. 539.

DECREE.

1. Where a decree of sale of property is made, it is generally left to counsel to designate the length of time and mode of publication of the sale; the Court taking care that the notice is reasonable and fair.

Guise v. Middleton, 89.

2. A decree cannot be amended after it is enrolled, in a matter of materiality, unless the record exhibits something to amend by; a mere clerical mistake, or miscalculation, may be amended at any time, when the mistake is apparent on the face of the decree or record. *Ib.*
3. Where a decree by mistake, required certain property to be advertised for *six months*, for sale, when it was intended to be advertised for only *six weeks*, and the decree had been enrolled, the Court refused to amend it. *Ib.*

DEED.

1. Whenever the description given in a deed is imperfect, yet sufficient to point inquiry to the true locality and boundary of the land, there the deed is not void for uncertainty, but the defect may be cured by the aid of parol evidence in giving identity to the premises intended to be conveyed.

Jenkins, jun. v. Bodley, et al. 338.

2. Where general language in a deed of marriage settlement is inconsistent and in conflict with the purposes as defined in the deed, which the parties had in contemplation by the settlement, such general language will be qualified and restricted by the definite recital of the deed.

Williams v. Claiborne, et al. 355.

3. In the construction of deeds, the intention to be gathered from the whole instrument must prevail, unless inconsistent with settled rules of law. *Ib.*
4. W. (in debt) and H. (possessed of large property), being about to marry, by deed of settlement before the marriage, convey to a trustee for H.'s sole and separate use, all her property, and the interest, income, and proceeds thereof, on trust; 1. For the use of W. and H., for their natural lives, subject to disposal by H., by will. 2. That H. should have, during her life, full control over the property, and that it should not be subject to W.'s debts or his control. 3. That the trustee might sell when requested; *held*, that W., on the death of H., had no right in the property thus conveyed, or to a participation in the proceeds, income, or profits of it. *Ib.*

5. W., about to marry H., declared by deed, his intention to secure to H. the separate use and disposal of the property conveyed by the deed, and also the income and profits of it; *held*, that W. is estopped by the recital of the deed, to set up a claim either to the property, or the profits thereof. *Ib.*

6. If the description of land in a deed, though not certain in itself, points to anything which will give exact information of the locality and boundary of the premises, it is sufficient to charge a subsequent purchaser with notice.

Bingaman v. Hyatt, et al. 437.

7. A description in the following words; "lying and being in the county of

Yazoo, and State of Mississippi, situate on Short Creek, about three miles from Manchester, in township eleven, range two, west, in sections eight, nine, ten, and fifteen, containing about two thousand acres;" held, to be sufficient to affect future purchasers with notice. *Ib.*

8. The words "lawful heirs" and "her heirs forever" in a deed, are words of limitation of the estate to the donee, and not words of purchase for the heirs.

Warren v. Haley, et al. 647.

DEED OF TRUST.

1. G. G. bought slaves of N., which were introduced into this State, and sold in violation of law, and to secure the purchase-money executed a deed of trust on land; and afterwards sold the land to C. G., which was again sold under the deed of trust to N., at which sale also, C. G. became the purchaser, and executed his notes to N., for the purchase-money, and gave a deed of trust to secure their payment; N. attempted to sell under the deed of trust, and was enjoined by C. G., on the ground that this debt to N. was the assumption by him of the debt of G. G.; held, that the illegality of the consideration of the notes of G. G., did not attach to the notes given by C. G., and that N. was entitled to sell under the deed of trust.

Gibson's heirs v. Niblet, et al. 278.

2. Where notes are given, and a deed of trust executed to secure their payment, it is no ground for enjoining a sale under the deed of trust, that a suit at law is pending upon the notes, in which their validity is questioned. *Ib.*

DEFENCE AT LAW.

1. A. having made a payment upon a note, which is credited upon the back of it, being sued at law upon the note, permits judgment to be rendered against him for the whole amount of the note, without pleading payment, or calling the attention of court and jury to the credit on the back of the note, is not entitled to relief in a court of equity.

Commissioners of the Sinking Fund v. Patrick, et al. 110.

2. A party having a valid, legal defence, which, by gross negligence, he failed to make at law, cannot be heard to make it in a court of equity. *Ib.*
3. It is a valid defence to an action upon a promissory note against the maker, that the note belonged to a deceased person's estate, and that the plaintiff received it in payment of an individual debt of the *administrator*.

Cotton v. Parker, administratrix, 125.

4. *Quare.* Would the same rule apply, if the note were payable on its face to the administrator of the deceased's estate? *Ib.*
5. A. having purchased property at an administrator's sale of effects of B., cannot, when B.'s estate is insolvent, buy up the notes of B., to offset them against his debt to the administrator. *Ib.*
6. R. obtained a judgment against F. in Louisiana, by default, and sold a tract of land to F., in discharge of the judgment, and gave a receipt accordingly; subsequently, R. fraudulently procured the judgment by default in

Louisiana to be rendered final; and thereupon, brought a record thereof to Mississippi, and sued F., who permitted judgment to go by default, and filed his bill in this Court, alleging as his reason for not defending at law, that the final judgment in Louisiana was junior to the date of the receipt; *held*, that the defence of F. was purely legal, and that the reason given for not making the defence at law, was insufficient. *Fletcher v. Rapp*, 374.

7. M. indorsed a note in favor of G., upon which the maker afterwards paid part, and renewed the balance of a new note, which M. also indorsed. Suit was afterwards brought, and judgment obtained against M., when he exhibited his bill, stating, that the note had been given for an illegal consideration, which he was not aware of, till after judgment was given against him, and therefore he did not defend at law; *held*, that the excuse for not making the defence at law was insufficient, and equity could grant no relief. *Miller v. Gaskins*, 524.
8. An allegation, that the complainant did not come to the knowledge of the defect of his vendor's (who was an administrator) power to sell, until after the judgment at law in favor of the vendor for the purchase-money, is a sufficient excuse for not having made the defence at law.

Crismon v. Beasley, administrator, 561.

DEFENDANTS.

1. Persons not parties defendants to the original bills have no right to file a cross-bill in the case; but where the complainants elect to treat such proceeding as a cross-bill, by answering it, it will not be dismissed on motion, before final hearing. *Payne v. Cowan, et al.* 26.
2. Whether, in such case any decree can be given upon such bill at the final hearing. *Quare. Ib.*
3. A defendant, charged with colluding with his codefendant in regard to the transaction sought to be impeached, cannot be a witness for his codefendant, especially where he is liable for costs. *Pope v. Andrews, et al.* 135.
4. A vendor of land, who takes a deed of trust to secure to himself the purchase-money, is not a competent witness for the vendee, when the sale is attacked as fraudulent, to prove its fairness, or testify in relation to it, he being directly interested in upholding the sale, in order to enforce payment of the notes secured by the deed of trust. *Ib.*

DEMURRER.

1. A bill which sets up one sufficient ground for equitable relief, and then states another, upon which no relief can be had, is not thereby multifarious. *Martin Pleasants & Co. v. Glasscock, et al.* 17.
2. In such case, the defendant should demur to one part, and answer to the other; or answer generally, and object at the hearing to that part which is without claim to equitable cognizance. *Ib.*

3. To render a bill multifarious, the matters thereof must not only be separate and distinct, but each must be of character, entitling the complainant to separate equitable relief. *Ib.*
4. If a bill be multifarious, it cannot be demurred to on that account, unless the prayer be also multifarious. *Ib.*
5. A. and B. being indebted in a joint note to C., each executed mortgages upon their respective property to secure the note; C. filed his bill against both, to foreclose both mortgages; *held*, on demurrer to the bill, that it was not multifarious, and that a decree to foreclose both mortgages could be rendered at the same time. *Wilcox, et al. v. Mills, et al.* 85.

DEPOSITIONS.

1. Depositions, taken to be read on behalf of defendants to the original bill, upon notice given by counsel not representing any of the defendants to that bill, are irregularly taken, and will be suppressed. *Payne v. Cowan, et al.* 26.
2. It is a sufficient ground to suppress a deposition, that the witness testifying is a defendant to the original bill, and no order of court had been given, authorizing his deposition to be taken. *Ib.*
3. A deposition will be suppressed, only for the irregularity in the taking of it. *Gorden, Sr. v. Watkins, et al.* 37.
4. If the objection relates to the competency of the witness, it can only be made at the final hearing. *Ib.*
5. A commissioner is not necessary, under the present practice of this Court, to take depositions, they can be taken on notice. *Ib.*
6. Justices of the Peace, are authorized to take depositions to be read in this Court. *Ib.*
7. The evidence of service of a notice to take depositions must be by the return of the sheriff, or affidavit of the party serving the notice. *Ib.*

DISTRIBUTEES.

A bill filed by a distributee of his father's estate, against the administrator thereof, dismissed, upon answer of the administrator, and proof that he had paid over to the regularly appointed guardian of the complainant, his entire distributive portion. *Young v. Suggs, et al.* 393.

DIVORCE.

1. Where, upon the bill of the wife against the husband, a decree *a vinculo matrimonii* has been granted, the mere omission in that decree to provide for the alimony of the wife cannot affect the wife's right to such a provision, at a subsequent time, by a separate and distinct proceeding. *Shotwell v. Shotwell,* 51.
2. A circuit court having decreed a divorce *a vinculo matrimonii*, at the in-

- stance of the wife, the superior court of chancery has jurisdiction of a bill, by the divorced wife against the husband, to have alimony allotted to her. *Ib.*
3. A decree for alimony results from the decree for a divorce, but is not identical with it, or a necessary part of it. *Ib.*

DOWER.

1. F. and others, administrators of B., sold the real estate of B. to E., and filed their bill to foreclose the statutory lien for the purchase-money; B.'s wife had dower allotted to her in the land, and sold her right of dower to E., who dies; E.'s widow resists the application to foreclose the statutory lien, and claimed dower in the dower-right purchased by E.; *held*, that the purchase of E., of the dower-right of B.'s widow, enured to the benefit of the administrators, and that E.'s widow was not entitled to dower in the premises.
Fisher, et al., administrators, v. Grimes, 107.
2. A wife is dowable only of an estate of inheritance; a mere life-estate is not the subject of dower. *Ib.*
3. S. G. sold by deed of warranty, binding himself and heirs, a tract of land to M., who intermarried with A. G., one of the heirs of S. G.; M. alienated the land, and died; his widow applied for dower in the land so sold by her husband; *held*, that she was not entitled to dower therein.
Torrey v. Minor, et al. 489.

4. A statute of limitations of possessory actions embraces an application for dower. *Ib.*
5. The right of a widow to dower in the lands of her deceased husband, until ascertained and admeasured by metes and bounds, is a mere potential interest, amounting to nothing more than a *chose in action*, and cannot be seized and sold under an execution at law. *Ib.*

E.

EQUITABLE ASSETS.

1. P., being about to construct a railroad for an incorporated company, which was to make advances of money for that purpose, executed a mortgage to the company, to indemnify them against any loss by reason of his failure to comply with his contract; P., at a time when the company were largely in advance to him beyond the amount expended, abandoned his contract; *held*, that, as to the sum so in advance by the company, the damages sustained by them would be considered as liquidated, and so far the mortgage and damages would be subject in equity to a judgment creditor of a company, seeking to subject them as equitable assets.
Wright, et al. v. Petrie, et al. 282.
2. Where a judgment creditor has his execution returned "nulla bona," but afterwards levies the same on personal property, in which the defendant in the execution has merely an equitable interest, and, pending the levy, files

his bill in the court of chancery, to subject the equitable interest of the defendant to the payment of his judgment debt; *held*, that the right of the complainant to the equitable relief was established by the return of "nulla bona," and was not disproved by the levy upon property not subject to sale under execution. *Ib.*

ESTATES OF DECEDENTS.

1. A creditor of the estate of a deceased person cannot come into equity to subject to the satisfaction of his debt, the property of the decedent, in the hands of a third person, who has intermeddled with and possessed himself thereof. *Martin Pleasants & Co. v. Glasscock, et al.* 17.
2. In such case the creditor has a plain, adequate, and unembarrassed remedy at law. *Ib.*
3. W. B. dies, intestate; S. B. administers upon his estate, and leaves the country with the property of W. B. in possession; *held*, that the chancery court has jurisdiction of a suit, by the distributees of W. B., to attach the property of S. B. left in this State, and subject it to the payment of his liability to the estate of W. B., that being clearly ascertained by the pleadings and proof, and it appearing that the executor's debts were all paid, and no administration then pending upon the estate.

Barrow, et al. v. Barrow, 101.

4. If the debts were unpaid, or administration *de bonis non* existing, in either case, the bill would have to be filed by the administrator *de bonis non*, to subject the property for the benefit of the creditors, and ascertain the amount of the indebtedness of the first administrator. *Ib.*
5. An administrator, in selling the property of his intestate, must follow strictly the mode pointed out by the statutes on that subject.

Steger, administrator, v. Bush, et al. 172.

6. Where the statute, regulating sales of estates of deceased persons, requires the administrator to take, of the purchaser, "bond with approved security;" *held*, that the bond of the purchaser, and not the transfer of the note of any third person, was contemplated by the law. *Ib.*
7. An administrator sold property of his intestate, and took of the purchaser his bond for the payment, and also the note of a third person, and agreed to collect the proceeds of that note, and apply them to the payment of the purchaser's bond; *held*, that no neglect on the part of the administrator to collect the note, and the consequent loss thereby, could have the effect of relieving the purchaser from the payment of his bond, or of discharging the statutory mortgage thereon. *Ib.*
8. In such case, the administrator would be regarded as the agent of the purchaser *quoad hoc*, the collecting the note, and not of the estate. *Ib.*
9. It is a valid defence to an action upon a promissory note against the maker, that the note belonged to a deceased person's estate, and that the plaintiff received it in payment of an individual debt of the administrator.

Cotton v. Parker, administratrix, 125.

INDEX.

10. *Quare.* Would the same rule apply, if the note were payable on its face to the administrator of the deceased's estate? *Ib.*
11. A. having purchased property at an administrator's sale of the effects of B., cannot, when B.'s estate is insolvent, buy up notes of B., to offset them against his debt to the administrator. *Ib.*
12. Where A. and B. have respectively mutual and subsisting demands against the other, and A. dies insolvent, B.'s debt against A. will be a valid offset to A.'s debt against B., notwithstanding A.'s insolvency. *Ib.*
13. Where a legacy was given, payable out of a fund in Louisiana, and the testator had property in this State, which the legatee attempted to subject to the payment of his legacy; *held*, that the property in this State could not be resorted to, until the fund in Louisiana was shown to be insufficient.
Montgomery, et ux, v Milliken, et ux, et al. 495.
14. Where, by the law of Louisiana, a person who has married a second wife, and who has children by his former wife, is interdicted from leaving his widow more than one fifth of his estate, and that only as an *usufruct*; yet, makes a will, leaving to his wife a large sum of money absolutely, the legacy is invalid and the bequest void. *Ib.*
15. An administrator, who sells property of his intestate, and takes insufficient security for the purchase, is liable for the amount lost thereby, if he did so from bad faith, not otherwise. *Davis, administrator, v. Verby, executrix.* 508.
16. C. filed his bill, alleging that B., administrator, sold a lot of ground of his intestate to him, representing that he had full power to sell, when in fact he had none, and no order of court had been obtained for that purpose; that he had executed his note for the purchase-money, had been sued and judgment obtained against him; that he did not know, until after judgment, that B. had no power to sell, and that he had no order for that purpose; B. demurred to the bill; *held*, that the bill presented a good case for relief, that B. was guilty of fraud in the misrepresentation, and that the demurrer must be overruled. *Crisman, et al. v. Beasley, administrator, &c.* 561.
17. Where an administrator sells property of his intestate, there is an implied covenant with the purchaser that he has authority to sell. *Ib.*
18. Where a judgment has been obtained against the representatives of a deceased person, and the estate of the deceased has been represented insolvent to the probate court, it is irregular under the statute (How. and Hutch. 410), to sue out an execution upon such judgment against the estate, and a court of chancery will enjoin it.
Neibert's administrators v. Withers, 599.
19. Where the administrators have represented their intestate's estate insolvent, and have filed a bill to enjoin an execution, upon a judgment at law obtained since the representation, it is no answer to the bill that the representation of insolvency was procured by fraud, or that the administrators had improperly managed and used the estate. *Ib.*
20. It is not necessary, before the estate of a deceased person can be declared insolvent, that the real and personal estate of the deceased should be sold

and reduced to money; it is sufficient, if the administrator or executor, from a comparison of the probable value of the real and personal estate, with the debts, shall deem the estate insolvent, and so represent it. *Ib.*

21. Where property of an intestate is sold by order of a probate court, the records of that court must show that the statutory prerequisites for the validity of such a sale have been complied with; otherwise, such sale would pass no title. *Lowry & Puckett v. McDonald & Rogers*, 620.
22. A purchaser at an administrator's sale, who had not complied with the prerequisites of the law in obtaining the order of sale, can obtain an injunction to the payment therefor. *Ib.*
23. P., being administratrix upon the estate of S. P., exchanged some notes of her intestate for two negroes, which were inventoried as the property of the estate of S. P.; P. intermarried with S., against whom judgment was afterwards obtained, and execution thereon levied on one of these negroes; held, that the negro was the property of the estate of S. P., and not liable to the judgment. *Shaw, et ux, v. Thompson, et al.* 628.
24. If an administrator buy property with the means of his intestate, the property so bought will be considered and treated in equity as part of the estate of the deceased. *Ib.*

ESTOPPEL.

W., about to marry H., declares by deed his intention to secure to H. the separate use and disposal of the property conveyed by the deed, and also the income and profits of it; held, that W. is estopped, by the recitals of the deed, to set up a claim, either to the property, or the profits thereof.

Williams v. Claiborne, et al. 355.

EVIDENCE.

1. The evidence of service of a notice to take depositions, must be by the return of the sheriff, or affidavit of the party serving the notice.
Gordon, Sr. v. Watkins, et al. 37.
2. Where the original notes given by the mortgagor of a tract of land, for the purchase-money, are taken up, and new ones substituted instead, by the vendee, and the vendor files his bill to enforce his equitable lien, the answer of the vendee, that the new notes were received in satisfaction and discharge of that lien, is not evidence.

Planters Bank of Mississippi v. Courtney, 40.

3. Oral evidence will not, in any case, be admitted, on the trial of an issue in this Court; not even to prove the incompetency, show the interest, or attack the credibility, of the witness. *M'Intyre v. Ledyard, Hatter, & Co.* 91.
4. A defendant, charged with colluding with his codefendant in regard to the transaction sought to be impeached, cannot be a witness for his codefendant, especially, where he is liable for costs. *Pope v. Andrews, et al.* 135.

INDEX.

5. A vendor of land, who has taken a deed of trust to secure to himself the purchase-money, is not a competent witness for the vendee, where a sale is attacked as fraudulent, to prove its fairness, or testify in relation to it, he being directly interested in upholding the sale, in order to enforce payment of the notes secured by the deed of trust. *Ib.*
6. Where the bill charged upon the defendant the introduction of negroes into this State, for sale, which was positively denied by the answer, and proof in corroboration of the answer taken; *held*, that proof of mere admissions of the party defendant, that he had so introduced the negroes, would not, alone, be sufficient to overthrow the positive denial of the answer, and the corroborative proof. *Hope v. Evans, et al.* 195.
7. Proof of mere admissions of a party, unsustained by any other circumstances, should always be cautiously weighed; because of their liability to be misunderstood, the facility of fabricating them, and the difficulty of disproving them. *Ib.*
8. Wherever the description given in the deed of trust is imperfect, yet sufficient to point inquiry to the true locality and boundary of the land, then the deed is not void for uncertainty, but the defect may be cured by the aid of parol evidence, in giving identity to the premises intended to be conveyed. *Jenkins, jun. v. Bodley, et al.* 338.
9. Where the bill avers the execution of a deed, of the 10th March, 1836, and the answer denies the execution of such a deed, and the proof shows the execution of a deed, of the 13th of March, 1836; *held*, that the variance excluded the deed from testimony. *Bacon, et al. v. Conn.* 348.
10. In such case, the Court would allow an amendment, if the variance were accidental. *Ib.*
11. C. conveyed two negroes to B., by a bill of sale, absolute and unconditional upon its face; *held*, that it was competent for C. to prove by parol, that the bill of sale was intended as a mere mortgage, to secure B. a sum of money. *Craft v. Bullard*, 366.
12. Where a will, made in another State, is probated there, and the testator has property in this State, and a copy of the probated will is admitted to probate in this State, according to the statute (How. & Hutch. 388); in a suit for a legacy under the will, brought in the courts of this State, a certified copy of the probated copy of the will, from the Probate Court in this State, will be admissible evidence. *Montgomery, et uxor, v. Milliken, et uxor, et al.* 495.

EXCEPTIONS.

Exceptions to the opinion of the Chancellor, on the trial of an issue before him, excluding or admitting testimony, must be taken at the time, and entered upon the minutes. *M'Intyre v. Ledyard, Hatter, & Co.* 91.

EXECUTION.

1. The return of satisfaction upon an execution, though false, so far extinguishes the lien of the judgment upon which the execution issued, that property of the defendant in the execution, sold subsequent to the return, would no longer be subject to it. *Parks v. Person, et al.* 76.
2. *Alier*, if the false return is made after sale of property of the defendant; in such case, on the return being vacated, the lien would still exist on the property previously sold. *Ib.*
3. It is wholly irregular to set aside a return of satisfaction upon an execution, in a court of law, without notice, at least, to the defendant in the execution; such a proceeding is absolutely void. *Ib.*
4. Whether, where the vacating a false return upon an execution will affect the rights of subsequent purchasers from the defendant in the execution, these subsequent purchasers are entitled to notice of the proceedings? *Quære. Ib.*
5. Where a judgment creditor has his execution returned "*nulla bona*," but afterwards levies the same on personal property, in which the defendant in the execution has merely an equitable interest, and, pending the levy, files his bill in the Court of Chancery, to subject the equitable interest of the defendant to the payment of his judgment debt; *held*, that the right of the complainant to the equitable relief, was established by the return of "*nulla bona*," and was not disproved by the levy upon property not subject to sale under execution. *Wright, et al. v. Petrie, et al.* 282.
6. The interest of a mere mortgagee is in the nature of a chose in action, and cannot, therefore, be seized and sold under an execution at law. *Boisgerard, et al. v. Wall,* 404.

EXECUTORS AND ADMINISTRATORS.

1. A court of equity will entertain a bill for discovery, and an account of assets, against an executor or administrator, upon a mere legal claim. *Martin, Pleasants, & Co. v. Glasscock, et al.* 17.
2. Where a person is sought to be charged in equity, as executor *de son tort*, he should be sued as a regular executor. *Ib.*
3. It is not necessary to make the personal representative of a deceased party a defendant to a bill filed by creditors, seeking to subject a fund specifically pledged by the defendant for the payment of their debt; no claim being made upon the general assets of the estate. *Ib.*
4. Where the testator directed certain lots of ground to be sold by his executor, if, in the opinion of the executor, it should be advisable to accomplish the purposes of the will; *held*, that this was a discretionary power conferred upon the executor, personally, and could not be exercised by the administrator *cum testamento annexo.* *Montgomery, et uxor, v. Milliken, et uxor, et al.* 495.

5. An administrator, who revives a suit of a deceased complainant, is not a competent witness on behalf of his intestate, because he is liable for costs.
M'Intyre v. Ledyard, Hatter, & Co. 91.
6. W. B. dies intestate; S. B. administers upon his estate, and leaves the country with the property of W. B. in possession; *held*, that the Court of Chancery has jurisdiction of a suit by the distributees of W. B., to attach the property of S. B. left in this State, and subject it to the payment of his liability to the estate of W. B., that being clearly ascertained by the pleadings and proof, and it appearing that the ancestor's debts were all paid, and no administration then pending upon the estate.
Barrow, et al. v. Barrow, 101.
7. If the debts were unpaid, or administration *de bonis non* existing, in either case, the bill would have to be filed by the administrator *de bonis non*, to subject the property for the benefit of the creditors, and ascertain the amount of the indebtedness of the first administrator. *Ib.*
8. An administrator, in selling the property of his intestate, must follow, strictly, the mode pointed out by the statutes on that subject.
Steger, administrator, v. Bush, et al. 172.
9. Where the statute regulating sales of estates of deceased persons, requires the administrator to take of the purchaser "bond, with approved security"; *held*, that the bond of the purchaser, and not the transfer of the note of any third person, was contemplated by the law. *Ib.*
10. An administrator sold property of his intestate, and took of the purchaser his bond for the payment, and also the note of a third person, and agreed to collect the proceeds of that note, and apply them to the payment of the purchaser's bond; *held*, that no neglect on the part of the administrator, to collect the note, and the consequent loss thereby, could have the effect of relieving the purchaser from the payment of his bond, or of discharging the statutory mortgage thereon. *Ib.*
11. In such case, the administrator would be regarded as the agent of the purchaser *quoad hoc*, the collecting the note, and not of the estate. *Ib.*
12. A bill filed by a distributee of his father's estate, against the administrator thereof, dismissed, upon answer of the administrator, and proof that he had paid over to the regularly appointed guardian of the complainant his entire distributive portion. *Young v. Suggs, et al.* 393.
13. D. filed his bill against B., executrix of W. B., alleging, that the estate of W. H. was indebted to him; and that W. B., while administrator of W. H.'s estate, had rendered himself liable to that estate, and sought to subject that liability to the payment of the debt of the estate to him; *held*, that the administrator *de bonis non* of W. H. was a proper party to the suit, the estate of W. H. not being finally settled, or alleged to be insolvent.
Davis, administrator, v. Yerby, executrix, 508.
14. An administrator, who sells property of his intestate, and takes insufficient security for the payment of the purchase, is liable for the amount lost thereby, if he do so from bad faith, not otherwise. *Ib.*

15. A bill against an administrator, charging him with waste and embezzlement of his intestate's estate, must make specific and definite charges of the particular waste and embezzlement; general charges are not sufficient. *Ib.*
16. Where it is sought to charge an executrix for default or negligence, the particular default must be put in issue, and established by evidence. *Ib.*
17. An administrator of an administrator cannot be called to account for the estate of the first intestate, without proof, that the estate in fact came to his hands. *Ib.*
18. Where an interval of twelve years has elapsed since an executor has ceased to act in that capacity, and an attempt is made to bring him to an account; and he answers, that he has fully administered, no decree for an account will be rendered against him. *Ib.*
19. C. being an administrator of a deceased mortgagor, was garnisheed by B., a creditor of the mortgagee, and answered, admitting the debt; and judgment was rendered against him: C. afterwards found that the mortgagee had previously transferred the mortgaged notes to G., who insisted on their payment to him: C. filed his bill, making them all parties, and requiring them to interplead and settle their conflicting rights to the mortgage debt, and praying an injunction against the judgment of B.; *held*, the case presented by the bill was a proper one for interpleader, and that the judgment of B. should be enjoined until it was ascertained whether the transfer of the notes was made before or after the judgment; and, if before, that the judgment of B. should be perpetually enjoined. *Cannon v. Kinney, et al.* 555.
20. Where an administrator sells property of his intestate, there is an implied covenant with the purchaser that he has authority to sell.

Crisman, et al. v. Beasley, administrator, 561.

21. It is essential to the validity of an administrator's sale, that the probate record show a substantial compliance with the requirements of the statute on that subject. *Ib.*
22. Where a judgment has been obtained against the representatives of a deceased person, and the estate of the deceased has been represented insolvent to the probate court, it is irregular under the statute (How. & Hutch. 410) to sue out an execution upon such judgment against the estate, and a court of chancery will enjoin it. *Neiber's administrators v. Wilkers,* 599.
23. Where the administrators have represented their intestate's estate insolvent, and have filed a bill to enjoin an execution upon a judgment at law obtained since the representation, it is no answer to the bill that the representation of insolvency was procured by fraud, or that the administrators had improperly managed and used the estate. *Ib.*
24. It is not necessary, before the estate of a deceased person can be declared insolvent, that the real and personal estate of the deceased should be sold and reduced to money; it is sufficient if the administrator or executor, from a comparison of the probable value of the real and personal estate with the debts, shall deem the estate insolvent, and so represent it. *Ib.*
25. A purchaser at an administrator's sale, who has not complied with the pre-

INDEX.

requisites of the law in obtaining the order of sale, can obtain an injunction to the payment of the purchase-money therefor.

Lowny & Puckett v. McDonald & Rogers, 620.

26. P., being administratrix upon the estate of S. P., exchanged some notes of her intestate for two negroes, which were inventoried as the property of the estate of S. P.; P. intermarried with S., against whom judgment was afterwards obtained, and execution thereon levied on one of these negroes; *held*, that the negro was the property of the estate of S. P., and not liable to the judgment. *Shaw, et al. v. Thompson, et al.* 628.
27. If an administrator buy property with the means of his intestate, the property so bought will be considered and treated in equity as part of the estate of the decedent. *Ib.*
28. Where an administrator buys property with the effects of his intestate, and inventories that property so purchased, in the inventory of his intestate's effects in the probate court, and the inventory is recorded in that court, the record of the inventory will be notice of the fiduciary character of the property so purchased and inventoried. *Ib.*
29. An administrator may have a right given to him by statute of a trial at law, of the right of property of his intestate's effects, when levied on by execution, without impairing the right of the administrator to relief in equity. *Ib.*

EXECUTOR DE SON TORT.

Where a person is sought to be charged in equity as executor *de son tort*, he should be sued as a regular executor.

Martin, Pleasants, & Co. v. Glasscock, et al. 17.

EXHIBITS.

A bill may be taken for confessed, even though the exhibits to the bill are not filed. *Gwin v. Stone*, 124.

F.

FAILURE OF CONSIDERATION.

P., about to trade with D. for the note of H., went to H. to inquire if the note was good. H. answered, it was good, and would be paid at maturity; P. therefore traded for the note, and assigned it to J. (informing him of H.'s statement), who sued H. thereon; *held*, that H. was precluded by the representations made to P. from setting up as a defence to the suit by J. any failure of consideration between himself and D., the original holder of the note.

Hamer, et al. v. Johnston, et al.; Marshall v. Morton, et al. 563.

FORTHCOMING BOND.

1. An order of a circuit court, quashing a forthcoming bond at a term subsequent to the return term of the bond, is a mere nullity.

Bingham v. Hyatt, et al. 437.

2. The execution of a statutory forthcoming bond does not discharge the levy of the execution, under which it is taken; that levy continues in full force until the bond is forfeited, and acquires the force and effect of a judgment. *Ib.*
3. An irregular forthcoming bond, incapable of forfeiture, being taken, does not discharge the levy of the execution, and upon the quashing such a bond, the original levy remains in full force. *Ib.*
4. Upon an execution issuing upon a judgment, a levy was made and an illegal forthcoming bond was given, which was afterwards quashed; another execution issued upon the original judgment, and property was sold under it; *held*, that the purchaser acquired no title, the judgment being in law satisfied by the first levy. *Ib.*
5. A forthcoming bond, for the delivery of property taken in execution, signed in blank and afterwards filled up by the sheriff without authority, is void; and a court of chancery will decree such bond to be cancelled.

Patterson v. Denton, 592.

FRANCHISE.

A railroad, built by an incorporated company, for public travel and transportation, is a mere franchise, and not assignable by the company.

Robins, et al. v. Embry, et al. 207.

FRAUD.

1. An agreement between two parties, that one shall hold in his name the property of the other, and shall pay with it the debts of the latter, and use it as he may direct, is such an agreement as a court of equity will enforce as between the parties; and it can only be assailed, at the instance of creditors who are thereby defrauded. *Everett v. Winn, et al.* 67.
 2. E. files his bill, stating that he held of W., in secret trust, for the benefit of W., and to secure advances of himself for W.'s account; that W. was in arrears for money thus advanced in a large sum, and had fraudulently procured G. to become the purchaser, with W.'s money, at a tax sale of the property so held by E., and seeking to subject the property in the hands of G. to the advances so made; *held*, that a court of equity would have jurisdiction of the case; upon the answer, however, of G., denying the fraud, and it not being established by proof, the jurisdiction would cease. *Ib.*
 3. Where a vendee comes to the knowledge of a fraud, practised upon him in the sale of property, and afterwards continued for a series of years in the use, enjoyment, and occupation thereof, without taking any active measures for redress, or making known any dissatisfaction, until a change of times may have depreciated its value, he can have no relief in equity.
- Pintard v. Martin, et al.* 126.
4. A sale by one greatly in debt, and whose every means were more than demanded to meet his immediate and pressing wants, of his property on a credit of nine, ten, and eleven years, is made "with intention to hinder, delay, and defraud creditors." *Pope v. Andrews, et al.* 135.

INDEX.

5. If a vendor make a fraudulent sale of his property to avoid the payment of his debts, to a vendee, ignorant of the fraud of the vendor, the vendee will be protected, as a purchaser for valuable consideration. *Ib.*
6. Fraud may be inferred from facts and circumstances, such as the nature of the contract, and the relation and circumstances of the parties. *Ib.*
7. A vendee of land, held to be privy to the fraud of the vendor:—1. Because he was the brother of the vendor, and lived in the same neighborhood, and sometimes together. 2. Because the vendor, at the time of sale, was embarrassed by debts, and that embarrassment known to the vendee, and the vendor had declared his intention not to pay the debts embarrassing him, which declaration, from their relation, the vendee was presumed to have known. 3. Because the sale was made upon a credit of eleven years, and the vendee knew the effect would be to divest the vendor of all his property, and thereby hinder, delay, and defraud creditors in the collection of their debts. *Ib.*
8. A corporate body can make an assignment of its property, in trust, for the payment of its just debts, preserving to each creditor the right of sharing equally, according to the amount of his claim.

Robins, et al. v. Embry, et al. 207.

9. The property of a banking corporation is a trust-fund for all its creditors; and in an assignment by such corporation, if a preference in favor of the debts due to any particular creditor or set of creditors is given, the assignment will be void. *Sed Quere.* *Ib.*
10. The creditors of a corporate body can enforce their claims against any of the property of the incorporation, in the hands of persons affected with knowledge of its corporate character. *Ib.*
11. It is essential to the validity of an assignment, by an incorporation, that the assignor, by the assignment, part absolutely with all title to the property, and all authority to control it, free from all restrictions that will unnecessarily delay creditors; there must be no reservation, for the assignor's benefit, except of the surplus; no authority given to control or direct the assignees; and all the uses must be expressly declared; where any of these objections exist, the assignment will be void. *Ib.*
12. A banking company, to which a railroad was by its charter affixed, having nearly completed the road, exhausted its means, being compelled to make an assignment for the benefit of its creditors, and the period for completing the road, allowed by the charter of the company, having nearly expired, the expiration of which, without the completion of the road, would cause a forfeiture of the charter, and the road in its then condition being comparatively worthless, and its not being completed would be a total loss to the company of the amount expended, and would, if not destroy, greatly diminish the ability of the company to meet its debts; *held*, that a provision in the deed of assignment, authorizing the assignees to borrow \$250,000 to complete the road, and pledging the assets of the company, and the profits of

- the road for the payment of that sum, when borrowed, before any of the other debts were paid, did not vitiate the assignment. *Ib.*
13. If an assignment be otherwise free from the imputation of fraud, it is not vitiated by being made in part to secure anticipated advances, especially where those advances are in aid of the general purposes of the assignment. *Ib.*
14. A banking corporation, with a railroad annexed, in making an assignment of its effects to assignees to pay its debts, assigned to the assignees the power of managing and controlling the railroad; *held*, that this provision of the assignment merely assigned the profits of the road, with the temporary control of the road to the assignees, for the benefit of the creditors, and did not vitiate the assignment. *Ib.*
15. In such case, if the charter had required a committee of the directory to manage the road, an assignment by the directory of the management of the road to others than a committee of the directory, would be a matter between the directors and stockholders, or the latter and the government, and could not be questioned by another person. *Ib.*
16. A provision in a deed of assignment by a corporation, that the directory should have power to appoint new trustees to fill any vacancy that may occur, by death or otherwise, is not a reservation that will vitiate the assignment. *Ib.*
17. Where, by an assignment for the benefit of creditors, twelve months were allowed to collect the debts, and convert into money the property of the assignor, before distribution among the creditors, the debts being numerous and widely scattered over the country, and the creditors of the assignor residing at distant places; *held*, that the time allowed was not unreasonable, and would not render the assignment void. *Ib.*
18. Where an assignment is made by a bank of its effects to pay its debts, at a period of great pecuniary embarrassment and general insolvency, power is given by the assignment to the assignors to compromise with the debtors of the bank in such manner as would be, in the judgment of the assignees, "to the interest of the creditors of said bank"; *held*, that the assignment was not vitiated by such a provision, and the power might be exercised. *Ib.*
19. Where a bank with a railroad attached, in an assignment of its effects, made the assignees the joint agents of the bank and its creditors; in the management of the road, the agents of the bank, and in the receipt and disbursement of the profits, the agents of the creditors; *held*, that the provision in the assignment gave the bank no control over the assignees, and did not avoid the assignment. *Ib.*
20. In an assignment by a bank of its effects, by a provision, prohibiting the assignees from paying any claim, until their validity had been tested in a mode pointed out in the assignment; *held*, not to avoid the assignment. *Ib.*
21. Where in a deed of assignment of its property, a bank conveyed in general words, all its effects; *held*, that the omission to annex a schedule of the property assigned, is no objection to the validity of the assignment. *Ib.*
22. In a deed of assignment by a bank, a covenant on the part of the assignees

INDEX.

- to exhibit, periodically, a statement of their account to the board of directors, is no objection to the validity of the assignment. *Ib.*
23. Where a deed of assignment by an incorporation of its effects for the payment of its debts, is void in part, it is void *in toto*. *Ib.*
24. A provision in a deed of assignment by a bank, requiring the assignees "to pay all the necessary expenses of the president, directors, and company of the bank, in the management of the corporation"; *held*, not to be such a reservation for the benefit of the grantor, as will make the assignment void upon its face; the fund assigned for the payment of the debts being not only a limited and definite amount, but also of an indefinite assignment of annually accruing profits; and the reservation not appearing to be for any fraudulent purpose. *Ib.*
25. P. contracted to build a railroad for the Brandon Bank, at a stipulated price, receiving money from the bank for that purpose, executed a mortgage to secure its proper application: P. abandoned the work before its completion; and, while the bank was in advance of money to P., the bank, being in embarrassed and failing circumstances, without valid consideration, voluntarily released the mortgage, and discharged P. from the debt; *held*, that the release of the mortgage, and the discharge of the debt, were fraudulent and void, as to the judgment creditors of the bank.
- Wright, et al. v. Petrie, et al.* 282.
26. R. obtained a judgment against F. in Louisiana, by default, and sold a tract of land to F. in discharge of the judgment, and gave a receipt accordingly; subsequently, R. fraudulently procured the judgment by default in Louisiana to be rendered final, and thereupon brought a record thereof to Mississippi and sued F., who permitted judgment to go by default, and filed his bill in this court, alleging, as his reason for not defending at law, that the final judgment in Louisiana was junior to the date of the receipt; *held*, that the defence of F. was purely legal, and that the reason given, for not making the defence, was insufficient. *Fletcher v. Rapp*, 374.
27. Where the plaintiff in a judgment rendered in a sister State, comes here to enforce it, it is entirely competent for the defendant to show, that the judgment was obtained by fraud. *Ib.*
28. Fraud vitiates judicial acts, and renders them utterly void. *Ib.*
29. A rescission of a contract on account of alleged defect of title, will not be granted, where, at the hearing of the case, it is apparent a perfect title may be had, and no fraud is alleged or proved. *Fletcher v. Wilson, et al.* 376.
30. As a general rule, a court of equity will not rescind a contract for mere defect of title, where the vendor has been guilty of no fraud, mistake, or misrepresentation, unless, at the time of the decree, it appeared that the vendor is totally unable to make title, and there is no adequate remedy at law. *Ib.*
31. C. filed his bill, alleging, that B., administrator, sold a lot of ground of his intestate to him, representing that he had full power to sell, when in fact he had none, and no order of court had been obtained for that purpose; that he

had executed his note for the purchase-money, had been sued, and judgment had been obtained against him; that he did not know, till after judgment, that B. had no power to sell, and that he had no order for that purpose: B. demurred to the bill; *held*, that the bill presented a good case for relief; that B. was guilty of a fraud in the misrepresentation, and that the demurral must be overruled. *Crisman, et al. v. Beasley, administrator*, 561.

G.

GARNISHMENT.

R., being surety to A. R. for T., was indemnified by a mortgage on T.'s property, and filed his bill to foreclose the mortgage, and be discharged from his suretyship; *held*, it was no answer to this bill, that T. had been garnisheed at law, as a debtor of A. R., and that the garnishment was still pending.

Robinson v. Thompson, et al. 454.

GUARDIAN.

1. A bill, filed by a distributee of his father's estate against the administrator thereof, dismissed, upon answer of the administrator, and proof that he had paid over to the regularly appointed guardian of the complainant his entire distributive portion. *Young v. Sugge, et al.* 393.
2. D., in the year 1815, offered to take charge of V., a motherless infant, and educate her at her own expense, and did so until the year 1824, when she took out letters of guardianship over V. and her property, and in her report as guardian, to the probate court, in 1832, stated that she had kept no account against V., and from her friendship to her mother had been induced to raise and educate V.; *held*, that, under these circumstances, there was no foundation, either in law or in fact, for any charge in favor of D. against V. prior to the year 1830. *Davis v. Roberts*, 543.
3. Where a guardian expends more money upon his ward than the income of his ward's estate, without authority from the proper tribunal, he does so at his peril; and, having so done, he has no claim to have the principal property sold to reimburse him in such excess, much less a right to retain the property for that purpose. *ib.*

H.

HIRE.

A mortgagor, who sells a portion of the mortgaged property, must account for the value of the property sold, and, if slaves, for their hire.

Craft v. Bullard, 366.

HUSBAND AND WIFE.

1. The husband has no power, without the consent of the wife, to convert her

INDEX.

- real property into personality, so as to change the course of descent or right of succession. *Fletcher v. Wilson, et al.* 376.
2. S. by deed of gift, conveyed to F. certain negroes, in these words, "in trust for the use and benefit of my daughter Ann and her lawful heirs," "in trust for the proper use and benefit of the said Ann and her heirs forever"; held, that these words conveyed to the daughter an estate for her sole separate use, and that, during her life, it was not subject to the debts of the husband. *Warren v. Haley, et al.* 647.
 3. Where personal property is conveyed to the wife and her heirs, for her sole and separate use, and she died, the husband surviving is entitled to the property, *jure mariti*, in preference to her next of kin. *Ib.*

I.

INDEMNITY.

1. Where a bill is filed to recover the amount of a lost note, it is not necessary to have tendered indemnity before the bill was filed, or to the parties themselves; it is sufficient, if it is offered by the bill. *Smith, et al. v. Walker, et al.* 432.
2. A court of chancery has no jurisdiction of a bill upon a lost note, unless indemnity is offered upon the face of the bill. *Ib.*
3. A court of equity has jurisdiction of a bill, filed to recover from the indorsees of a lost note the amount of the note; the basis of equity jurisdiction in such cases being the power of the court to compel indemnity. *Ib.*

INJUNCTION.

1. The neglect of the complainant to have process served, is just ground for dissolving an injunction in the case. *Payne v. Cowan, et al.* 27.
2. The rule in such case is based upon the ground of negligence; where process has been regularly sued out, but irregularly served, and the complainant proceeds to take out new process, as soon as the irregularity is discovered, the rule will not apply. *Ib.*
3. A party, having a valid defence to a portion of the amount of a judgment at law against him, cannot have an injunction for the whole amount of the judgment. *Commissioners of the Sinking Fund v. Patrick, et al.* 110.
4. Where notes are given, and a deed of trust executed to secure their payment, it is no ground for enjoining a sale under the deed of trust, that a suit at law is pending upon the notes, in which their validity is questioned. *Gibson's heirs v. Niblet, et al.* 278.
5. Where a bill of exchange was taken by a judgment creditor from his debtor, the amount of which, if paid, was to be credited on the judgment, and the bill was not paid; held, on a bill filed by the judgment debtor, to enjoin so much of the judgment at law, that the judgment creditor must either credit the judgment, or deliver back the bill of exchange. *Newman v. Meek,* 331.

6. C. filed his bill against B., alleging that B. had obtained a judgment at law upon a note, to secure the payment of which, he had conveyed B. two negroes, averring that B. had been in possession of one ever since the sale, and prays for an account of his hire, and of his value, and for an injunction against the judgment at law; *held*, that upon such a bill the injunction could not be obtained. *Craft v. Bullard*, 366.
7. A mortgagor has no right to force the mortgagees to take the property at an assessed value, and cannot call for an account upon any such principle. *Ib.*

INSOLVENT ESTATES.

1. Pending a bill filed by an administrator, to ascertain to whom notes secured by a mortgage, made by his intestate, should be paid, the estate of the mortgagor was declared insolvent, which fact was made the matter of a supplemental bill by the administrator; *held*, that the insolvency of the estate did not suspend the action of the Court in granting a decree in the case, or the right of the successful litigant to a sale of the mortgaged premises to pay his debt. *Cannon v. Kinney, et al.* 555.
2. Where a judgment has been obtained against the representatives of a deceased person, and the estate of the deceased has been represented insolvent to the Probate Court, it is irregular under the statute (How. & Hutch. 410) to sue out an execution upon such judgment against the estate, and a court of chancery will enjoin it. *Neiber's, administrators v. Withers*, 599.
3. Where the administrators have represented their intestate's estate insolvent, and have filed a bill to enjoin an execution upon a judgment obtained at law since the representation, it is no answer to the bill that the representation of insolvency was obtained by fraud, or that the administrator had improperly managed and used the estate. *Ib.*
4. It is not necessary, before the estate of a deceased person can be declared insolvent, that the real and personal estate of the deceased should be sold and reduced to money; it is sufficient if the administrator or executor, from a comparison of the probable value of the real and personal estate with the debts, shall deem the estate insolvent, and so represent it. *Ib.*

INTERLOCUTORY DECREE

1. An application for an appeal from an interlocutory decree of the chancellor, where money is not required to be paid or property transferred by the decree, is addressed to the discretion of the chancellor, and will not be granted if any important principle in the cause remains undecided. *Wright, et. al. v. Petrie, et. al.* 282.
2. An interlocutory decree for an account is always under the control of the Court, and may, under peculiar views, even after confirmation of the report by a commissioner taking an account under the decree, be reviewed and set aside. *Davis v. Roberts*, 543.
3. D. filed her bill, claiming a large sum to be due from R.'s intestate, V.

INDEX.

(for whom D. had once been guardian), for sums expended for V. while she was her ward. An interlocutory decree for an account, though the bill did not pray for an account, was ordered, and the commissioner reported a large balance to be due D. for the care of V., not only while the relation of guardian and ward existed, but for a period long anterior to that time; which report, although excepted to by both parties, was confirmed, without disposing of the exceptions; *held*, upon final hearing of the cause, that the report of the commissioner was not *res adjudicata* by order of the confirmation, but was under the control of the Court, and should be set aside and annulled for irregularity. *Ib.*

INTERPLEADER.

C. being the administrator of a deceased mortgagor, was garnisheed by B., a creditor of the mortgagee, and answered, admitting the debt, and judgment was rendered against him; C. afterwards found that the mortgages had previously transferred the mortgage notes to G., who insisted on their payment to him; C. filed his bill, making them all parties, and requiring them to interplead and settle their conflicting rights to the mortgage debt, and praying an injunction against the judgment of B.; *held*, the case presented by the bill was a proper one of interpleader, and that the judgment of B. should be enjoined, until it was ascertained whether the transfer of the notes was before or after the judgment of B., and, if before, that the judgment should be perpetually enjoined. *Cannon v. Kinney, et al.* 555.

J.

JUDGMENT.

1. A court of equity will limit the lien of a judgment to the interest which the judgment debtor actually had in the property, at the time of rendering the judgment, so far, at least, as to protect the prior equities of third persons. *Jenkins v. Bodley, et al.* 338.
2. R. obtained a judgment against F. in Louisiana, by default, and sold a tract of land to F. in discharge of the judgment, and gave a receipt accordingly; subsequently, R. fraudulently procured the judgment by default in Louisiana to be rendered final; and thereupon brought a record thereof to Mississippi, and sued F., who permitted judgment to go by default, and filed his bill in this Court, alleging as his reason for not defending at law, that the final judgment in Louisiana was junior to the date of the receipt; *held*, that the defence of F. was purely legal, and that the reason given for not making the defence at law was insufficient. *Fletcher v. Rapp*, 374.
3. Where the plaintiff in a judgment rendered in a sister State comes here to enforce it, it is entirely consistent for the defendant to show, that the judgment was obtained by fraud. *Ib.*
4. Fraud vitiates judicial acts, and renders them utterly void. *Ib.*

5. Courts, acting under the same system of local jurisprudence, should, where their organization and mode of procedure admit of it, make their judgments equally comprehensive. *Wright, et al. v. Sheldon, et al.* 399.
6. A judgment in this State, of older date than the registration of a mortgage, though junior to its execution, will be a prior lien upon the land embraced in the mortgage. *Bingeman v. Hyatt, et al.* 437.
7. A levy upon personal property sufficient to satisfy the judgment, is, while the levy subsists, a satisfaction of the judgment, and a sale of other property than that embraced in the levy, by another execution on the same judgment, while the first levy remains undisposed of, passes no title. *Ib.*
8. Upon an execution issuing upon a judgment, a levy was made, and an illegal forthcoming bond was given, which was afterwards quashed; another execution issued upon the original judgment, and property was sold under it; held, that the purchaser acquired no title, the judgment being in law satisfied by the first levy. *Ib.*
9. A judgment in Tennessee, and a return of *nulla bona* upon an execution thereon, are not sufficient foundation to apply to a court of equity to subject the *chores in action* of the judgment debtor, to the payment of the debt. *Dick, et al. v. Truly, et al.* 557.
10. A creditor at large cannot come into a court of chancery, upon a purely legal claim, and enjoin his debtor from selling, receiving, or disposing of his effects. *Freeman v. Finnall, et al.* 624.

JURISDICTION.

1. A creditor of the estate of a deceased person cannot come into equity to subject to the satisfaction of his debt property of the decedent in the hands of a third person, who has intermeddled with and possessed himself thereof. *Martin, Pleasantis, & Co. v. Glasscock, et al.* 17.
2. In such case, the creditor has a plain, adequate, unembarrassed remedy at law. *Ib.*
3. A court of equity will entertain a bill for discovery, and an account of assets, against an executor or administrator, upon a mere legal claim. *Ib.*
4. In such case, the defendant should demur to one part, and answer to the other, or answer generally, and object at the hearing to that part which is without claims to equitable cognizance. *Ib.*
5. Where, upon the bill of the wife against the husband, a decree *a vinculo matrimonii* has been granted, the mere omission in that decree to provide for the alimony of the wife, cannot affect the right to such a provision, at a subsequent time, by a separate and distinct proceeding. *Shetwell v. Shetwell,* 51.
6. A circuit court, having decreed a divorce *a vinculo matrimonii*, at the instance of the wife, the superior court of chancery has jurisdiction of a bill by the divorced wife, against the husband, to have alimony allotted to her. *Ib.*
7. An agreement between two parties, that one shall hold in his name the property of the other, and shall pay with it the debts of the latter, and use it as he may direct, is such an agreement as a court of equity will enforce, as

INDEX.

- between the parties, and it can only be assailed at the instance of creditors who are thereby defrauded. *Everett v. Wren, et al.* 67.
8. E. files his bill, stating that he held of W., in secret trust, for the benefit of W., and to secure advances of himself for W.'s account; that W. was in arrears for money thus advanced in a large sum, and had fraudulently procured G. to become the purchaser with W.'s money, at a tax sale of the property so held by E., and seeking to subject the property in the hands of G. to the advance so made; *held*, that a court of equity would have jurisdiction of the case; upon the answer, however, of G., denying the fraud, and it not being established by proof, the jurisdiction would cease. *Ib.*
9. W. B. dies intestate, S. B. administers upon his estate, and leaves the country with the property of W. B. in possession; *held*, that the Court of Chancery has jurisdiction of a suit by the distributees of W. B. to attach the property S. B. left in this State, and subject it to the payment of his liability to the estate of W. B., that being clearly ascertained by the pleadings and proof, and it appearing that the ancestor's debts were all paid, and no administration then pending upon the estate. *Barrow, et al. v. Barrow*, 10L.
10. If the debts were unpaid, or administration *de bonis non* existing, in either case, the bill would have to be filed by the administrator *de bonis non*, to subject the property for the benefit of the creditors, and ascertain the amount of the indebtedness of the first administrator. *Ib.*
11. The fact, that both parties to a suit in chancery in the State courts claim the land in controversy, under a treaty to which the United States is a party, has, in itself, nothing to exclude the jurisdiction of the State courts. *Heirs of Charles Land v. Heirs of Thomas Land*, 158.
12. Where a judgment creditor has his execution returned *nulla bona*, but afterwards levies the same on personal property, in which the defendant in the execution has merely an equitable interest, and, pending the levy, files his bill in the court of chancery, to subject the equitable interest of the defendant to the payment of his judgment debt; *held*, that the right of the complainant to the equitable relief was established by the return of *nulla bona*, and was not disproved by the levy upon property not subject to sale under execution. *Wright, et al. v. Petrie, et al.* 282.
13. A court of chancery has jurisdiction to decree a cancellation of a tax collector's deed, in a proper case. *Bacon, et al. v. Conn*, 348.
14. R. obtained a judgment against F. in Louisiana, by default, and sold a tract of land to F. in discharge of the judgment, and gave a receipt accordingly; subsequently R. fraudulently procured the judgment by default in Louisiana to be rendered final; and thereupon brought a record thereof to Mississippi, and sued F., who permitted judgment to go by default, and filed his bill in this Court, alleging as his reason for not defending at law, that the final judgment in Louisiana was junior to the date of the receipt; *held*, that the defence of F. was purely legal, and that the reason given for not making the defence at law, is insufficient. *Fletcher v. Rapp*, 374.

15. A court of chancery has no jurisdiction of a bill upon a lost note, unless indemnity is offered upon the face of the bill.
Smith, et al. v. Walker, et al. 432.
16. Before a party can come into equity to recover upon a lost note, he must make affidavit of its loss. *Ib.*
17. A court of equity has jurisdiction of a bill filed to recover, from the indorsers of a lost note, the amount of the note; the basis of equity jurisdiction in such cases being the power of the court to compel indemnity. *Ib.*
18. Courts of equity have power to grant new trials at law, where from fraud of the one party, or unavoidable accident, or unforeseen necessity, the other party, without negligence on his part, has been unable to make out his case on the first trial. *Herring v. Winans, et al.* 466.
19. As a general rule, a suit for the recovery of a legacy should be brought against the executor, in the jurisdiction having cognizance of the will; yet, when the fund out of which the legacy is payable, is traced to the possession of the heir of testator, in a different jurisdiction from that having cognizance of the will, the suit may be maintained there.
Montgomery, et ux, v. Milliken, et ux, et al. 495.
20. The jurisdiction of the circuit courts in the foreclosure of mortgages, is concurrent and coextensive with that of the Superior Court of Chancery.
Tooley v. Kane, et al. 518.
21. If it should become necessary to file an original bill to enforce a decree for the foreclosure of a mortgage rendered by the circuit court, that court would have jurisdiction to entertain such a bill as an incident to its power to decree the foreclosure. *Ib.* See *Mortgage*, 26.
22. After general answer, the defendant cannot raise the question of jurisdiction on the hearing, unless the defect of jurisdiction goes to the very subject-matter of the suit. *Davis v. Roberts*, 543.
23. The probate courts of this State have, under our constitution, sole jurisdiction of the subject of wills; a jurisdiction, at least, commensurate with that of the courts of Great Britain; and the Court of Chancery has no power in this State to decree the probate of a will void, even though charged to have been procured by fraud; such power belonging exclusively to the probate courts. *Hamberlin, et al. v. Terry, executor, et al.* 589.
24. A forthcoming bond for the delivery of property taken in execution, signed in blank, and afterwards filled up by the sheriff without authority, is void; and a court of chancery will decree such a bond to be cancelled.
Patterson v. Denton, 592.
25. F. filed his bill against W. F., alleging, that they had been partners, and that W. F. was indebted to him on their partnership liabilities, and also on his private account, in a large sum, not reduced to judgment, and seeking to attach a debt due by M. & D. to W. F., to be appropriated to the payment of W. F.'s debt to F.; held, that the Court of Chancery had no jurisdiction of the case. *Freeman v. Finnall, et al.* 624.
26. A creditor at large cannot come into a court of chancery upon a purely

legal claim, and enjoin his debtor from selling, receiving, or disposing of his effects. *Ib.*

27. An administrator may have a right given to him by statute, of a trial at law of the right of property of his intestate's effects, when levied on by execution, without impairing the right of the administrator to relief in equity.

Shaw, et ux., v. Thompson, et al. 628.

JUSTICE OF PEACE.

Justices of the Peace are authorized to take depositions to be read in this court.

Gordon, sen. v. Watkins, et al. 37.

L.

LACHES.

1. A. having made a payment upon a note, which is credited upon the back of it, being sued at law upon the note, permits judgment to be rendered against him for the whole amount of the note, without pleading payment, or calling the attention of court and jury to the credit on the back of the note, is not entitled to relief in a court of equity.

Commissioners of the Sinking Fund v. Patrick, et al. 110.

2. A party having a valid legal defence, which, by gross negligence he failed to make at law, cannot be heard to make it in a court of equity. *Ib.*
3. An administrator sold property of his intestate, and took of the purchaser his bond for the payment, and also the note of a third person, and agreed to collect the proceeds of that note, and apply them to the payment of the purchaser's bond; *held*, that no neglect on the part of the administrator, to collect the note and the consequent loss thereby, could have the effect of relieving the purchaser from the payment of his bond, or of discharging the statutory mortgage thereon. *Sleger, administrator, v. Bush, et al.* 172.
4. Where a creditor, having sued upon collateral paper, granted a stay of execution for six months upon the judgment; *held*, that the stay is not such delay (unless the stay is the occasion of the loss of the debt) as will render the creditor responsible for the amount of the collateral paper. *Ib.*

LEGACY.

1. As a general rule, a suit for the recovery of a legacy should be brought against the executor, in the jurisdiction having cognizance of the will; yet, when the fund out of which the legacy is payable, is traced to the possession of the heir of the testator, in a different jurisdiction from that having cognizance of the will, the suit may be maintained there.

Montgomery, et ux., v. Milliken, et ux., et al. 495.

2. Where a legacy was given, payable out of a fund in Louisiana, and the testator had property in this State, which the legatee attempted to subject to the payment of his legacy; *held*, that the property in this State could not be resorted to, until the fund in Louisiana was shown to be insufficient. *Ib.*

3. Where the testator, in his will, gave the executor a discretion to sell a portion of his realty, but did not direct an absolute sale; *held*, that the realty was not thereby converted into personalty, and that a pecuniary legacy was not chargeable thereon, unless so expressly provided by the testator. *Ib.*
4. Where, by the law of Louisiana, a person who has married a second wife, and who has children by his former wife, is interdicted from leaving his widow more than one fifth of his estate, and that as an *usufruct*, yet, makes a will, leaving his wife a large sum of money absolutely, the legacy is invalid and the bequest void. *Ib.*
5. Where by the law of Louisiana it is provided, that if a disposal of property by will, exceed the quantum, of which a person may legally dispose, and the same law also provided, that the husband of a second wife, and who had children by a former wife, can only bequeath to his second wife by will the extent of the *usufruct* of one fifth of his estate; it was *held*, that the bequest by the husband of a second wife, who was domiciled in Louisiana, of an absolute sum of money to her, was void, and could not be reduced under the provision of the law. *Ib.*
6. All personal property of a testator, not disposed of, that by lapse, or void bequest for illegality, does not pass as directed by the testator, goes to the residuary legatee; a different rule prevails as to real estate.

Hamberlin, et al. v. Terry, executor, et al. 589.

LEVY.

1. A levy upon personal property, sufficient to satisfy the judgment, is, while the levy subsists, a satisfaction of the judgment; a sale of other property than that embraced in the levy, by another execution in the same judgment, while the first levy remains undisposed of, passes no title.
Bingaman v. Hyatt, et al. 437.
2. The execution of a statutory forthcoming bond does not discharge the levy of the execution, under which it is taken; that levy continues in full force until the bond is forfeited, and acquires the force and effect of a judgment. *Ib.*
3. An irregular forthcoming bond, incapable of forfeiture, being taken, does not discharge the levy of the execution, and, upon the granting such a bond, the original judgment remains in full force. *Ib.*
4. Upon an execution issuing upon a judgment, a levy was made, and an illegal forthcoming bond was given, which was afterwards quashed, and another execution issued upon the original judgment, and property was sold under it; *held*, that the purchaser acquired no title; the judgment being in law satisfied by the first levy. *Ib.*
5. *Quære.* Where a sheriff levies upon and sells more land than is necessary to satisfy the execution, where the land is capable of division, is such a sale void? *Ib.*

6. The lien of an attachment commences and takes effect from the time of the levy, and not from the time of issuing the attachment.

Mears & Walker v. Winslow, et al. 449.

LIEN.

1. Where the original notes given by the mortgagor of a tract of land for the purchase-money, are taken up and new ones substituted instead by the vendee, and the vendor files his bill, to enforce his equitable lien, the answer of the vendee, that the new notes were received in satisfaction and discharge of that lien is not evidence.

Planters Bank of Mississippi v. Courtney, 40.

2. The return of satisfaction upon an execution, though false, so far extinguishes the lien of the judgment upon which the execution issued, that property sold subsequent to the return would no longer be subject to it.

Parks v. Person, et al. 76.

3. *Aliter*, if the false return is made after sale of property of the defendant; in such case, on the return being vacated, the lien would still exist on the property previously sold. *Ib.*

4. It is wholly irregular to set aside a return of satisfaction upon an execution, in a court of law, without notice, at least, to the defendant in the execution; such a proceeding is absolutely void. *Ib.*

5. Whether where the vacating a false return upon an execution, will affect the rights of subsequent purchasers from the defendant in the execution, these subsequent purchasers are entitled to notice of the proceedings. *Quare. Ib.*

6. F. and others, administrators of B., sold the real estate of B. to E., and filed their bill to foreclose the statutory lien for the purchase-money; B.'s wife had dower allotted to her in the lands, and sold her right of dower to E., who dies; E.'s widow resists the application to foreclose the statutory lien, and claims dower in the dower right purchased by E.; *held*, that the purchase of E. of the dower right of B.'s widow enured to the benefit of the administrators, and that E.'s widow was not entitled to dower in the premises. *Fisher, et al. administrator, &c. v. Grimes,* 107.

7. A court of equity will limit the lien of a judgment, to the interest which the judgment debtor actually had in the property at the time of rendering the judgment, so far, at least, as to protect the prior equities of third persons.

Jenkins v. Bodley, et al. 338.

8. A judgment in this State, of older date than the registration of a mortgage, though junior to its execution, will be a prior lien upon the land embraced in the mortgage. *Bingaman v. Hyatt, et al.* 437.

9. The lien of an attachment commences and takes effect from the time of the levy, and not from the time of issuing the attachment. *Mears & Walker v. Winslow, et al.* 449.

10. Where, by a contract of sale of real estate, part of the purchase-money

was to be paid down, and the remainder in instalments, secured by deed of trust, before the property is to be delivered, and only a portion of the cash payment is made, and the property is delivered, and the deed of trust for the instalments taken; *held*, that the vendor has no equitable lien upon the land sold, for the unpaid portion of the purchase-money, agreed to be paid in cash. *Phillips v. Saunderson, et al.* 462.

11. Where there is an express lien, received by the vendor for part of the consideration money, of real estate sold, it excludes the idea of an implied lien on the land for the residue of the unpaid purchase-money. *Ib.*
12. Where a party buying land, agreed to make a cash payment in part, and secure the remainder of the purchase-money by deed of trust on the land purchased, and when the sale was consummated paid only a portion of the proposed cash payment, and the vendor filed a bill in equity to enforce a supposed equitable lien for that unpaid portion; *held*, although the complainant was not entitled to the relief he asked, yet his bill shall be dismissed at the cost of the vendee, who occasioned the injury. *Ib.*

LIFE ESTATE.

A wife is dowable only of an estate of inheritance. A mere life estate is not the subject of dower. *Fisher, et al. administrator, &c. v. Grimes*, 107.

LIMITATION.

The words, "lawful heirs," and "her heirs forever," in a deed, are words of limitation of the estate to the donee, and not words of purchase for the heirs. *Warren v. Haley, et al.* 647.

LOST NOTE.

1. A prior owner of a note, who, while such, obtained judgment at law against the maker of the note, and afterwards, and while the note was lost, transferred the contents of the note, and the right to control its proceeds, has the legal title to the note, and is a proper party to a bill filed to recover the amount of the lost note from the indorsers. *Smith, et al. v. Walker, et al.* 432.
2. Where a bill is filed to recover the amount of a lost note, it is not necessary to have tendered indemnity before the bill was filed, or to the parties themselves. It is sufficient, if it is offered by the bill. *Ib.*
3. A court of chancery has no jurisdiction of a bill upon a lost note, unless indemnity is offered upon the face of the bill. *Ib.*
4. Before a party can come into equity to recover upon a lost note, he must make affidavit of its loss. *Ib.*
5. A court of equity has jurisdiction of a bill filed to recover from the indorsers of a lost note, the amount of the note; the basis of equity jurisdiction in such cases being the power of the court to compel indemnity. *Ib.*

M.

MARRIAGE.

1. Where, upon the bill of the wife against the husband, a decree "*a vinculo matrimonii*" has been granted, the mere omission in that decree to provide for the *alimony* of the wife, cannot affect the wife's right to such a provision at a subsequent time, by a separate and distinct proceeding.

Shotwell v. Shotwell, 51.

2. A circuit court having decreed a divorce *a vinculo matrimonii*, at the instance of the wife, the superior court of chancery has jurisdiction of a bill by the divorced wife against the husband, to have alimony allowed to her. *Ib.*

MARRIAGE SETTLEMENT.

1. Where general language in a deed of marriage settlement is inconsistent and in conflict with the purposes as defined in the deed, which the parties had in contemplation by the settlement, such general language will be qualified and restricted by the definite recital of the deed.

Williams v. Claiborne, et al. 355.

2. W. (in debt) and H. (possessed of large property) being about to marry, by deed of settlement before the marriage, convey to a trustee for H.'s sole and separate use, all her property and the interest, income, and proceeds thereof, on trust. 1. For the use of W. and H. for their natural lives, subject to disposal by H. by will. 2. That H. should have, during her life, full control over the property, and that it should not be subject to H.'s debts, or his control. 3. That the trustee might sell when requested; *held*, that W., on the death of H., had no right in the property thus conveyed, or to participate in the proceeds, income, or profits of it. *Ib.*
3. W., about to marry H., declared his intention to secure to H. the separate use and disposal of the property conveyed by the deed, and also the income and profits of it; *held*, that W. is estopped by the recitals of the deed, to set up a claim either to the property or the profits thereof. *Ib.*

MORTGAGE.

1. Where the original notes given by the mortgagor of a tract of land, for the purchase-money, are taken up and new ones substituted instead by the vendee, and the vendor files his bill to enforce his equitable lien, the answer of the vendee, that the new notes were received in satisfaction and discharge of that lien, is not evidence. *Planters Bank of Mississippi v. Courtney*, 40.
2. R. & H. introduced negroes into this State since the first of May, 1833, as merchandize and for sale, and sold them to R., and took in payment for them the notes of A. payable to H. G. R., and by H. G. R. indorsed, secured by mortgage on a tract of land; *held*, upon this state of fact, that R. & H. were entitled to foreclose the mortgage given by A. and assigned in payment of the illegal consideration by H. G. R. to R. & H.

Rowen & Harris v. Adams, et al. 45.

3. A. and B. being indebted in a joint note to C., each executed mortgages upon their respective property to secure the note; C. filed his bill against both to foreclose both mortgages; *held*, on demurrer to the bill, that it was not multifarious, and that a decree to foreclose both mortgages could be rendered at the same time. *Wilcox, et al. v. Mills, et al.* 85.
4. In a bill filed to foreclose a mortgage upon property which has passed by sale from the mortgagor into the possession of third persons, it is not necessary to allege in the bill, that the persons in possession had notice of the mortgage. *Stacy, administrator, &c. v. Barker, et al.* 112.
5. Where property at a probate sale is sold in Louisiana as the property of the succession and the community of the deceased husband and of his wife, and a mortgage is taken to secure the purchase-money, in a bill filed by the administrator of the husband in Mississippi, to foreclose the mortgage on the property which has been removed into the State of Mississippi, the wife of the intestate is a proper party. *Ib.*
6. An administrator sold property of his intestate, and took of the purchaser his bond for the payment, and also the note of a third person, and agreed to collect the proceeds of that note and apply them to the payment of the purchaser's bond; *held*, that no neglect on the part of the administrator to collect the note, and the consequent loss thereby, could have the effect of relieving the purchaser from the payment of his bond, or of discharging the statutory mortgage thereon. *Steger, administrator, v. Bush, et al.* 172.
7. P. contracted to build a railroad for the Brandon Bank, at a stipulated price; and, receiving money from the bank for that purpose, executed a mortgage to secure its proper application. P. abandoned the work before its completion, and while the bank was in advance of money to P.; the bank, being in embarrassed and failing circumstances, without valid consideration, voluntarily released the mortgage, and discharged P. from the debt; *held*, that the release of the mortgage, and the discharge of the debt, were fraudulent and void, as to the judgment creditors of the bank.
Wright, et al. v. Petrie, et al. 282.
8. Where a commissioner makes a sale of mortgaged premises, and the purchaser fails to comply with the precedent requirements of the decree, the commissioner has no authority to receive a bond from another person, of the amount of the purchaser's bid; but the property remains in his hands, as if no sale had taken place. *Vannerson v. Cord, et al.* 345.
9. A commissioner, having advertised the property for sale, upon a failure from any cause to sell on the appointed day, has power, unless his authority is restricted by the decree on its face, or limited to a single specified time, to advertise the property again and again, until he effectuates the object of his appointment. *Ib.*
10. The powers of a commissioner to sell property by decree of the Chancery Court, are precisely the same that a sheriff has when a writ of *fieri facias* is placed in his hands. *Ib.*
11. C. conveyed two negroes to B., by a bill of sale absolute and uncondi-

INDEX.

- tional upon its face ; *held*, that it was competent for C. to prove by parol, that the bill of sale was intended as a mere mortgage to secure B. a sum of money. *Craft v. Bullard*, 366.
12. The only relief a court of equity can grant a mortgagor upon his mortgage, is to allow him to redeem his mortgaged property, upon a bill properly shaped for that purpose. *Ib.*
13. C. filed his bill against B., alleging, that B. had obtained a judgment at law upon a note, to secure the payment of which he had conveyed B. two negroes; averring, that B. had been in possession of one ever since the sale, and prays for an account of his hire and of his value, and for an injunction against the judgment at law; *held*, that upon such a bill, the injunction could not be obtained. *Ib.*
14. A mortgagor has no right to force the mortgagee to take the property at an assessed value, and cannot call for an account upon any such principle. *Ib.*
15. A mortgagee, who sells a portion of the mortgaged property, must account for the value of the property sold, and, if slaves, for their hire. *Ib.*
16. Where there were one hundred partners who had each executed a mortgage to secure the debts of the partnership, and some of the partners were dead, leaving numerous representatives; *held*, that the mortgagee might foreclose each mortgage by a separate suit against each partner, without making the others parties. *Boisgerard, et al. v. Wall*, 404.
17. Where, by the articles of a partnership association for the purpose of private banking, each partner was to execute a mortgage to the partnership, to secure the payment of his debt in the partnership, and afterwards the mortgages were made, securing, not only the stock, but also the circulation and debts of a general character of the partnership; *held*, that the mortgages were a security for the debts of the partnership, to which a creditor, to whom the partnership had assigned the mortgages, might resort for payment. *Ib.*
18. The interest of a mere mortgagee is in the nature of a chose in action, and cannot, therefore, be seized and sold under an execution at law. *Ib.*
19. Where debts due to a partnership in five, ten, and fifteen years, had been secured by mortgages, the creditors of the partnership could not have any more summary remedy on the mortgages than the partners themselves would have. *Ib.*
20. Where each partner executes a mortgage to the partnership, for the purpose of "binding and rendering himself liable to pay the" partnership debts, and in the condition of the mortgage recites, that the mortgage is to be discharged when the liabilities of the partnership are all paid; *held*, that one of the objects of the mortgage, was to secure the payment of the debts of the partnership. *Ib.*
21. A judgment in this State, of older date than the registration of a mortgage, though junior to its execution, will be a prior lien upon the land embraced in the mortgage. *Bingaman v. Hyatt, et al.* 437.
22. R., holding a mortgage on T.'s property, agreed to receive some money, and take the property back in discharge of the mortgage; T. paid the money,

- but refused to deliver the property ; *held*, that the mortgage was not discharged by the agreement. *Robinson v. Thompson, et al.* 454.
23. R., being surety to A. R. for T., was indemnified by a mortgage on T.'s property, and filed his bill to foreclose the mortgage, and be discharged from his suretyship ; *held*, it was no answer to this bill, that T. had been garnished at law, as a debtor of A. R., and that the garnishment was still pending. *Ib.*
24. A mortgage being given to secure a debt to a partnership, upon the death of one of the firm, the surviving partner is the only necessary party, to represent the partnership interest. *Ib.*
25. The jurisdiction of the circuit courts, in the foreclosure of mortgages, is concurrent and coextensive with that of the superior court of chancery. *Tooley v. Kane, et al.* 518.
26. T. obtained a decree in the circuit court of Adams county, foreclosing a mortgage against G. upon a lot of ground ; the lot was sold by a commissioner to K., who gave bond, which was forfeited, and execution issued against K., and the mortgaged lot sold to M., who bought for K., but the money for which the lot sold was appropriated to an older execution against K. ; M. sold the lot to L., but the sale was fraudulent, K. still retaining possession ; in this state of fact, T. exhibited his bill in this Court, to have the various sales of the lot set aside, and his decree of foreclosure enforced ; *held*, that the circuit court was adequate to give relief, and this Court could render no aid to the complainant. *Ib.*
27. If it should become necessary to file an original bill to enforce a decree for a foreclosure of a mortgage, rendered by the circuit court, that court would have jurisdiction to entertain such a bill, as an incident to its power to decree the foreclosure. *Ib.*
28. A sale of mortgaged premises by a commissioner is a sale by the court, and is not complete, or title passed thereby, until a report thereof is made to the court, and that report confirmed. *Ib.*

MOTION.

1. A mere motion in court, to dissolve an injunction granted in a case, is not that formal entry of appearance, which will authorize the complainant to take a *pro confesso* against the party making the motion. *Cheunning, et al. v. Nichols, et al.* 122.
2. To justify the complainant's taking his bill for confessed, process must either have been served upon the other party, or his appearance, as a defendant to the cause, formally entered of record. *Ib.*

MULTIFARIOUSNESS.

1. A bill which sets up one sufficient ground for equitable relief, and then states another upon which no relief can be had, is not thereby rendered multifarious. *Martin, Pleasants, & Co. v. Glasscock, et al.* 17.

2. In such case, the defendant should demur to one part, and answer to the other; or answer generally, and object at the hearing to that part which is without claim to equitable cognizance. *Ib.*
3. To render a bill multifarious, the matters thereof must not only be separate and distinct, but each must be of a character entitling the complainant to separate equitable relief. *Ib.*
4. If a bill be multifarious, it cannot be demurred to on that account, unless the prayer be also multifarious. *Ib.*
5. Where the complainants in chancery assert one general claim, and the defendants have a common interest in the point litigated, they are properly united, though their rights as to the subject-matter of the suit may be separate. *Wright, et al. v. Shelton, et al.* 399.
6. A., being a judgment creditor of B., filed his bill in equity against B., C., D., E., and F., charging that C., D., E., and F. were each, respectively, in possession of property belonging to B., conveyed by B. to them individually, to defraud the creditors of B., and seeking to subject this property, in the hands of these different persons, to the payment of his judgment; *held*, upon the demurrer of these defendants, and answers denying fraud, that the bill was not multifarious. *Ib.*
7. It is not necessary to the joinder of different defendants in the same bill, that a privity exist between each two of the defendants, provided a privity exist between each of the defendants, separately, and the other defendants, upon whom the *gravamen* of the bill rests. *Ib.*

N.

NEGLIGENCE.

1. The neglect of the complainant to have process served, is just ground for dissolving an injunction in the case. *Payne v. Cowan, et al.* 27.
2. The rule in such case is based upon the ground of negligence; where process has been regularly sued out, but irregularly served, and the complainant proceeds to take out new process, as soon as the irregularity is discovered, the rule will not apply. *Ib.*
3. A. having made a payment upon a note, which is credited upon the back of it, being sued at law upon the note, permits judgment to be rendered against him for the whole amount of the note, without pleading payment, or calling the attention of court and jury to the credit on the back of the note, is not entitled to relief in a court of equity.

Commissioners of Sinking Fund v. Patrick, et al. 110.

4. A party having a valid legal defence, which, by gross negligence he failed to make at law, cannot be heard to make it in a court of equity. *Ib.*
5. M. indorsed a note in favor of G., upon which the maker afterwards paid part and renewed the balance by a new note, which M. also indorsed. Suit was afterwards brought and judgment obtained against M., when he exhibited his bill, stating that the note had been given for an illegal consideration,

which he was not aware of until after judgment was given against him, and therefore he did not defend at law; *held*, that the excuse given for not making the defence at law was insufficient, and equity could grant no relief.

Miller v. Gaskins, 524.

NEW TRIAL.

1. Courts of equity have power to grant new trials at law, where from fraud of the one party, an unavoidable accident, or unforeseen necessity, the other party, without negligence on his part, has been unable to make out his case, on the first trial. *Herring v. Winans, et al.* 466.
2. H., being an old and infirm man, unable to read, and being sued out of the county of his residence, writes to his lawyer, residing in the county where the suit is brought, the nature of his defence, and instructs him to defend the case; the letter is lost in the transmission, and judgment is obtained against H. by default; *held*, upon the application of H. for a new trial in a court of equity, that his excuse for not making his defence at law was sufficient. *Ib.*

NOTICE.

1. Depositions, taken to be read on behalf of defendants to the original bill, upon notice given by counsel, not representing any of defendants to that bill, are irregularly taken, and will be suppressed. *Payne v. Cowan, et al.* 27.
2. The evidence of service of a notice to take depositions, must be by the return of the sheriff, or affidavit of the party serving the notice. *Gordon v. Watkins, et al.* 37.
3. Taking property in payment of a preexisting debt does not make the buyer a purchaser for valuable consideration, in the eye of the law, as against one holding a prior equity. *Rowan & Harris v. Adams, et al.* 45.
4. W., being about to purchase a tract of land, was informed that R. and H. had "some sort of claim to it"; *held*, that this was sufficient to put W. upon the inquiry. *Ib.*
5. It is wholly irregular to set aside a return of satisfaction upon an execution, in a court of law, without notice at least to the defendant in the execution; such a proceeding is absolutely void. *Parks v. Person, et al.* 76.
6. Whether, where the vacating a false return upon an execution will affect the rights of subsequent purchasers from the defendants in the execution, these subsequent purchasers are entitled to notice of the proceedings. *Quare. Ib.*
7. In a bill filed to foreclose a mortgage, upon property which has passed by sale from the mortgagor into the possession of third persons, it is not necessary to allege in the bill, that the persons in possession had notice of the mortgage. *Stacy, administrator, &c. v. Barker, et al.* 112.

INDEX.

8. That a party is a *bona fide* purchaser without notice, is purely a matter of defence, and must be set up by the party who would avail himself of it, whether notice be charged or not. *Ib.*
9. Where a bill is filed to enforce a mortgage on property in the hands of persons in possession of the property by title derived from the mortgagor, the allegation that they hold by "a pretended purchase," is equivalent to a charge of notice of the mortgage. *Ib.*
10. The creditors of a corporate body can enforce their claims against any of the property of the incorporation, in the hands of persons affected with a knowledge of its corporate character. *Robins, et al. v. Embry, et al.* 207.
11. Want of notice protects a purchaser against a latent equity only, not against the legal title; in the latter case, the maxim, *caveat emptor*, applies. *Jenkins v. Bodley, et al.* 338.
12. A vendee, who would protect himself against a prior equity, upon the ground of being a *bona fide* purchaser without notice, must deny notice, fully, positively, and precisely, even though it be not charged on the other side. *Ib.*
13. Actual possession of land is constructive notice of the nature and extent of the interests and rights of the occupant. *Ib.*
14. If the description of land in a deed, though not certain in itself, points to anything which will give exact information of the locality and boundary of the premises, it is sufficient to charge a subsequent purchaser with notice. *Bingaman v. Hyatt, et al.* 437.
15. A description in the following words, "lying and being in the county of Yazoo, and State of Mississippi, situate on Short Creek, about three miles from Manchester, in township eleven, range two, west, in sections eight, nine, ten, and fifteen, containing about two thousand acres"; *held*, to be sufficient to affect future purchasers with notice. *Ib.*
16. Where an administrator buys property with the effects of his intestate, and inventories that property so purchased, in the inventory of his intestate's effects in the probate court, and the inventory is recorded in that court, the record of the inventory will be notice of the fiduciary character of the property so purchased and inventoried. *Shaw, et ux, v. Thompson, et al.* 428.

O.

OFFSET.

1. A., having purchased property at an administrator's sale of the effects of B., cannot, when B.'s estate is insolvent, buy up the notes of B., to offset them against his debt to the administrator. *Cotton v. Parker, administratrix*, 191.
2. Where A. and B. have, respectively, mutual and subsisting demands against the other, and A. dies insolvent, B.'s debt against A. will be a valid offset to A.'s debt against B., notwithstanding A.'s insolvency. *Ib.*
3. L. M. & Co., being the holders of a note secured by mortgage of W. H.,

received from a transferred claim, belonging to W. H., the sum of \$1100, in depreciated paper, but refused to deliver it to H. when called for; L. M. & Co. afterwards transferred the note of H. to D., who filed a bill to foreclose the mortgage; held, that H. was entitled to a credit of the \$1100 in specie. *Dick, et al. v. Truly, et al.* 557.

P.

PARTIES.

1. It is not necessary to make the personal representative of a deceased party a defendant to a bill filed by creditors, seeking to subject a fund specifically pledged by the decedent for the payment of their debt; no claim being made upon the general assets of the estate.

Martin, Peasants, & Co. v. Glasscock, et al. 17.

2. Persons not parties defendants to the original bill, have no right to file a cross-bill in the case; but where the complainants elect to treat such proceedings as a cross-bill, by answering it, it will not be dismissed on motion before the final hearing. *Payne v. Cowan, et al.* 27.

3. Whether, in such case, any decree can be given upon such bill at the final hearing? *Quere. Ib.*

4. It is a sufficient ground to suppress a deposition, that the witness testifying is a defendant to the original bill, and no order of court had been given, authorizing his deposition to be taken. *Ib.*

5. An assignor of a note, who has parted with all his right in it, and has no interest in the matter in controversy, and against whom no relief or discovery is prayed; held, on demurrer, not to be a necessary party to the bill.

Everett v. Winn, et al. 67.

6. A trustee to sell property, who has advertised it for sale, being the mere agent of the *cestui que trust*, and without interest in the controversy, is a proper party to a bill filed to enjoin the sale of the property embraced in the trust, on the ground of a fraudulent combination on the part of the *cestui que trust* and another person, to defraud the complainant of his right in the trust property. *Ib.*

7. Where property at a probate sale is sold in Louisiana, as the property of the succession and the community of the deceased husband and his wife, and a mortgage is taken to secure the purchase-money, in a bill filed by the administrator of the husband in Mississippi, to foreclose the mortgage on the property which has been removed into Mississippi, the wife of the intestate is a proper party. *Stacy, administrator, &c. v. Barker, et al.* 112.

8. The fact that both parties to a suit in chancery in the State courts, claim the land in controversy, under a treaty to which the United States is a party, has, in itself, nothing to exclude the jurisdiction of the State courts.

Heirs of C. Land v. Heirs of T. Land, 158.

9. Where the parties in interest are so numerous as to render it inconsistent, if not impracticable, to make them all defendants, without great delay and

- expense, and justice can be done between the parties before the Court without affecting the interest of the others, the Court will proceed to a decree, notwithstanding the want of parties. *Boisgerard, et al. v. Wall*, 404.
10. Where there were one hundred partners, who had each executed a mortgage to secure the debts of the partnership, and some of the partners were dead, leaving numerous representatives; *held*, that the mortgagee might foreclose each mortgage by a separate suit against each partner, without making the others parties. *Ib.*
11. A prior owner of a note, who, while such, obtained a judgment at law against the maker of the note, and afterwards, and while the note was lost, transferred the contents of the note and the right to control its proceeds, has the legal title to the note, and is a proper party to a bill filed to recover the amount of the lost note from the indorsers. *Smith, et al. v. Walker, et al.* 432.
12. A mere stranger, without interest in the matters in controversy, has no right to question the validity of the title to the property, as between the other parties to the suit. *Bingaman v. Hyatt, et al.* 437.
13. A mortgage being given to secure a debt to a partnership; upon the death of one of the firm, the surviving partner is the only necessary party to represent the partnership intestate. *Robinson v. Thompson, et al.* 454.
14. D. filed his bill against B., executrix of W. B., alleging, that the estate of W. H. was indebted to him; and that W. B., while administrator of W. H.'s estate, had rendered himself liable to that estate, and sought to subject that liability to the payment of the debt of the estate to him; *held*, that the administrator *de bonis non* of W. H. was a proper party to the suit, the estate of W. H. not being finally settled, or alleged to be insolvent.
Davis, administrator, v. Yerby, executrix, &c. 508.
15. P. & L. having sold land to H., and given bond for title, afterwards sold and conveyed it to B. & M., who had knowledge of the prior sale: H. filed his bill to obtain title, and did not make P. a party thereto; *held*, that P. was not a necessary party to the bill, the legal title being in B. & M. as trustees for H. *Hines v. Baine, et al.* 520.

PARTNERSHIP.

1. Where there were one hundred partners, who had each executed a mortgage, to secure the debts of the partnership, and some of the partners were dead, leaving numerous representatives; *held*, that the mortgagee might foreclose each mortgage, by a separate suit against each partner, without making the others parties. *Boisgerard, et al. v. Wall*, 404.
2. An incorporated association of men for the purposes of banking, is but a private partnership, and their contracts and liabilities are those of private partners. *Ib.*
3. Articles of partnership regulate the rights and powers of the partners among themselves, but as to third persons they may be altered by the conduct of the partners, so as to be contrary to or beyond their original terms. *Ib.*

4. Where, by the articles of a partnership association for the purpose of private banking, each partner was to execute a mortgage to the partnership, to secure the payment of his stock in the partnership, and afterwards the mortgages were made, securing not only the stock, but also the circulation and debts of a general character of the partnership; *held*, that the mortgages were a security for the debts of the partnership, to which a creditor, to whom the partnership had assigned the mortgages, might resort for payment. *Ib.*
5. Where debts due to a partnership in five, ten, and fifteen years, had been secured by mortgages, the creditors of the partnership could not have any more summary remedy on the mortgages than the partners themselves would have. *Ib.*
6. Where each partner executes a mortgage to the partnership, for the purpose of "binding and rendering himself liable to pay the" partnership debts, and in the condition of the mortgage, recites that the mortgagee is to be discharged when the liabilities of the partnership are all paid; *held*, that one of the objects of the mortgage, was to secure the payments of the debts of the partnership. *Ib.*
7. A mortgage being given to secure a debt to a partnership, upon the death of one of the firm, the surviving partner is the only necessary party, to represent the partnership interest. *Robinson v. Thompson, et al.* 454.
8. F. filed his bill against W. F., alleging that they had been partners, and that W. F. was indebted to him on their partnership liabilities, and also on his private account in a large sum not reduced to judgment, and seeking to attach a debt due by W. & D. to W. F., to be appropriated to the payment of W. F.'s debt to F.; *held*, that the court of chancery had no jurisdiction of the case. *Freeman v. Finnall, et al.* 624.
9. A bill uniting partnership and private demands, filed by one partner against another, is fatally defective. *Ib.*

PAYMENT.

1. Where N. was indebted to M. on his own account, and also collaterally as surety for Y., and N. makes payments to M. without specifying to which debt they were to be appropriated; *held*, that the law would apply the payment made under such circumstances to N.'s own debt.
Newman v. Meek, 331.
2. Where a bill of exchange was taken by a judgment creditor from his debtor, the amount of which, if paid, was to be credited on the judgment, and the bill was not paid; *held*, on a bill filed by the judgment debtor, to enjoin so much of the judgment at law, that the judgment creditor must either credit the judgment or deliver back the bill of exchange. *Ib.*
3. L. M. & Co., being the holders of a note, secured by mortgage of W. H., received from a transferred claim, belonging to W. H., the sum of \$1100 in depreciated paper; L. M. & Co. afterwards transferred the note of H. to D., who filed a bill to foreclose the mortgage; *held*, that H. was entitled to a credit of the \$1100, in specie. *Dick, et al. v. Truly, et al.* 557.

INDEX.

PERSONAL PROPERTY.

Where the testator, in his will, gave the executor a discretion to sell a portion of his realty, but did not direct an absolute sale; *held*, that the realty was not thereby converted into personalty, and that a pecuniary legacy was not chargeable thereon, unless so expressly provided by the testator.

Montgomery, et uxor, v. Milliken, et uxor, et al. 495.

PLEADING.

1. A bill which sets up one sufficient ground for equitable relief, and then states another, upon which no relief can be had, is not thereby rendered multifarious. *Martin, Pleasants, & Co. v. Glasscock, et al.* 17.
2. In such case, the defendant should demur to one part, and answer to the other; or answer generally, and object at the hearing to that part which is without claim to equitable cognizance. *Ib.*
3. To render a bill multifarious, the matters thereof must not only be separate and distinct, but each must be of character, entitling the complainant to separate equitable relief. *Ib.*
4. If a bill be multifarious, it cannot be demurred to, on that account, unless the prayer be also multifarious. *Ib.*
5. Where a complainant prays for particular relief, and for other and further relief, he can have no relief, inconsistent with the specific relief asked, even though there may be just foundation for it in the bill; in such case the prayer for other relief must be in the disjunctive. *Ib.*
6. Where the original notes given by mortgagor of a tract of land for the purchase-money are taken up, and new ones substituted instead by the vendee, and the vendor files his bill, to enforce his equitable lien; the answer of the vendee, that the new notes were received in satisfaction and discharge of that lien, is not evidence.

Planters Bank of the State of Mississippi v. Courtney. 40.

7. A. and B., being indebted in a joint note to C., each executed mortgages upon their respective property to secure the note; C. filed his bill against both, to foreclose both mortgages; *held*, on demurrer to the bill, that it was not multifarious, and that a decree to foreclose both mortgages could be rendered at the same time. *Wilcox, et al. v. Mills, et al.* 85.
8. That a party is a *bonâ fide* purchaser without notice is purely a matter of defence, and must be set up by the party who would avail himself of it, whether notice be charged or not.

Stacy, administrator, &c. v. Barker, et al. 112.

9. A vendee, who would protect himself against a prior equity, upon the ground of being a *bonâ fide* purchaser, without notice, must deny notice, fully, positively, and precisely, even though it be not charged on the other side. *Jenkins v. Bodley, et al.* 338.
10. Where the bill avers the execution of a deed of the 10th March, 1836, and the answer denies the execution of such a deed, and the proof shows

- the execution of a deed of the 13th of March, 1836; *held*, that the variance excluded the deed from testimony. *Bacon, et al. v. Conn, et al.* 348.
11. In such case, the court would allow an amendment, if the variance were accidental. *Ib.*
12. R. obtained a judgment against F. in Louisiana, by default, and sold a tract of land to F. in discharge of the judgment, and gave a receipt accordingly; subsequently, R. fraudulently procured the judgment by default in Louisiana to be rendered final, and thereupon brought a record thereof to Mississippi and sued F., who permitted judgment to go by default, and filed his bill in this Court, alleging, as his reason for not defending at law, that the final judgment in Louisiana was junior to the date of the receipt; *held*, that the defence of F. was purely legal, and that the reason given, for not making the defence at law, was insufficient. *Fletcher v. Rapp*, 374.
13. When the complainants in a bill in chancery assert one general claim, and the defendants have a common interest in the point litigated, they are properly united, though their rights as to the subject-matter of the suit may be separate. *Wright, et al. v. Shelton, et al.* 399.
14. A., being a judgment creditor of B., filed his bill in equity against B. C., D., E., and F., charging that C. D., E., and F. were each, respectively, in possession of property belonging to B., conveyed by B. to them individually to defraud the creditors of B., and asking to subject this property, in the hands of these different persons, to the payment of their judgment; *held*, upon the demurrer of these defendants, and answers denying fraud, that the bill was not multifarious. *Ib.*
15. It is not necessary to the joinder of different defendants in the same bill, that a privity exist between each two of the defendants, provided a privity exist between each of the defendants, separately, and the other defendants, upon whom the *gravamen* of the bill rests. *Ib.*
16. A bill, against an administrator, charging him with waste and embezzlement of his intestate's estate, must make specific and definite charges of the particular waste; general charges are not sufficient.
Davis, administrator, v. Yerby, executrix, &c. 508.
17. Where it is sought to charge an executor for default or negligence, the particular default must be put in issue, and established by evidence. *Ib.*
18. A bill, uniting partnership and private demands, filed by one partner against another, is fatally defective. *Freeman v. Finnall, et al.* 624.

POSSESSION.

Actual possession of land is constructive notice of the nature and extent of the interest and rights of the occupants. *Jenkins v. Bodley, et al.* 338.

POWER.

Where the testator directed certain lots of ground to be sold by his executor, if in his opinion it should be advisable, to accomplish the purposes of the will; *held*, that this was a discretionary power, conferred upon the executor

INDEX.

personally, and could not be exercised by the administrator *cum testamento annexo*. *Montgomery, et uxor, v. Milliken, et uxor, et al.* 495.

PRACTICE.

1. Where a cause is submitted for final hearing, and some point in the case is left unproved, or is not sufficiently explained, it is in the power or discretion of the chancellor to remand the case to the docket, and direct it to stand over for further proof. *Ib.*
2. A cause cannot be submitted, against the consent of the complainant, for final hearing, at the same term of the Court at which the answers are filed; the complainant is entitled to the succeeding term to take testimony. *Everett v. Winn, et al.* 67.
3. A complainant, making application to amend a sworn bill, after the answer of the defendant is filed, must show that the proposed amendment contains matter important to his rights, and which was unknown to him at the time of filing his original bill, or else he must show a special reason which will excuse him from negligence in the matter. *Ib.*
4. Where a decree of sale of property is made, it is generally left to counsel to designate the length of time and mode of publication of the sale; the court taking care that the notice is reasonable and fair.

Guise v. Middleton, 89.

5. A decree cannot be amended, after it is enrolled, in a matter of materiality, unless the record exhibits something to amend by; a mere clerical mistake, or miscalculation, may be amended at any time, when the mistake is apparent on the face of the decree or record. *Ib.*
6. Where a decree, by mistake, required certain property to be advertised for six months, for sale, when it was intended to be advertised for only six weeks, and the decree had been enrolled, the Court refused to amend it. *Ib.*
7. Exceptions to the opinion of the chancellor, on the trial of an issue before him, excluding or admitting testimony, must be taken at the time and entered upon the minutes. *M'Intyre v. Ledyard, Hatter, & Co.* 91.
8. Oral evidence will not in any case be admitted on the trial of an issue in this Court; not even to prove the incompetency, show the interest, or attack the credibility of the witness. *Ib.*
9. A mere motion in court, to dissolve an injunction granted in a case, is not that formal entry of appearance which will authorize the complainant to take a *pro confesso* against the party making the motion.

Chewning, et al. v. Nichols, et al. 122.

10. To justify the complainant's taking the bill for confessed, process must either have been served upon the other party, or his appearance as a defendant to the cause formally entered of record. *Ib.*
11. There are no regular appearance-days fixed by the rules of this Court; a party desirous of entering his appearance, can do so at any time while the Court is in session, by making his application, and having it entered of record. *Ib.*

12. A bill may be taken for confessed, even though the exhibits to the bill are not filed. *Gwin v. Stone*, 124.
13. A rehearing will be granted, as a general rule, when the party applying has complied strictly with the rule of the Court, in procuring the certificate of two respectable counsel in support of it, but not otherwise.
Cotton v. Parker, administratrix, 125.
14. Where a judgment creditor has his execution returned "nulla bona," but afterwards levies the same on personal property, in which the defendant in the execution has merely an equitable interest, and, pending the levy, files his bill in the Court of Chancery, to subject the equitable interest of the defendant to the payment of his judgment debt; *held*, that the right of the complainant to the equitable relief was established by the return of "nulla bona," and was not disproved by the levy upon property not subject to sale under execution. *Wright, et al. v. Petrie, et al.* 282.
15. A commissioner in chancery, to effect a sale by order of the Court, has no authority or power to substitute one purchaser for another, without the entire assent of the first purchaser. *Vannerson v. Cord, et al.* 345.
16. Where a commissioner makes a sale of mortgaged premises, and the purchaser fails to comply with the precedent requirements of the decree, the commissioner has no authority to receive a bond from another person of the amount of the purchaser's bid, but the property remains in his hand as if no sale had taken place. *Ib.*
17. A commissioner, having advertised the property for sale, upon a failure from any cause to sell on the appointed day, has power, unless his authority is restricted by the decree on its face, or limited to a single specified time, to advertise the property for sale again and again, until he effectuates the object of his appointment. *Ib.*
18. The powers of a commissioner to sell property, by decree of the Chancery Court, are precisely the same that a sheriff has when a writ of *fieri facias* is placed in his hands. *Ib.*
19. A defendant, in his cross-bill against the complainant, cannot introduce new and distinct subjects of litigation from those which are in controversy in the original suit. *Fletcher v. Wilson, et al.* 376.
20. A defendant to a bill, having any right in the property in controversy not noticed in the original bill, may assert that right by way of cross-bill. *Ib.*
21. Where by statute a judgment creditor who has run his execution without effect, can, by garnishment at law, bring in the debtors of his judgment debtor, and divert their debts to the satisfaction of his own; a court of equity will, by analogy to the proceedings at law under similar circumstances, adopt a similar course. *Wright, et al. v. Shellon, et al.* 399.
22. Courts, acting under the same system of local jurisprudence, should, where their organization and mode of procedure will admit of it, make their judgments equally comprehensive. *Ib.*
23. Where the parties in interest are so numerous as to render it inconvenient, if not impracticable, to make them all defendants, without great delay and

INDEX.

- expense, and justice can be done between the parties before the Court without affecting the interest of the others, the Court will proceed to a decree, notwithstanding the want of parties. *Boisgerard, et al. v. Wall*, 404.
24. Where there were one hundred partners, who had each executed a mortgage to secure the debts of the partnership, and some of the partners were dead, leaving numerous representatives; held, that the mortgagee might foreclose each mortgage by a suit against each partner, without making the others parties. *Ib.*
25. If a bill of review is sustained, in a case which, when decided, was ready for final hearing, but in which the Court erred in rendering the decree merely, the whole case is not thereby reopened, but the Court will only correct the error in the decree, so as to make it conform to the law.
Mercer, administrator, v. Stark, 479.
26. If a bill of review is sustained because the case, when submitted, was not in a proper attitude for final hearing, the whole case is open for re-examination. *Ib.*
27. Where it is sought to charge an executor for default or negligence, the particular default must be put in issue, and established by evidence.
Davis, administrator, v. Yerby, executrix, 508.
28. Applications to set aside *pro confesso* are addressed to the discretion of the Court, upon the circumstances of each particular case, and will, as a general rule, be granted, if not productive of injurious delay, and the applicant has not been culpably negligent. *Gwin v. Harris*, 528.
29. G. filed his bill against H., a nonresident, and, upon proof of publication of notice, took his bill confessed: H. applied for leave to answer, stating, that he knew of the pendency of the bill, but his counsel informed him no answer would be needed; as soon as he learned a *pro confesso* had been entered against him, he came to the State to have it set aside: the cause was not in a state for final hearing, for want of further evidence on the part of the complainant; held, that the *pro confesso* should be set aside, and the answer filed, upon the payment of all costs by the defendant. *Ib.*
30. An interlocutory decree for an account is always under the control of the Court, and may, under peculiar views, even after a confirmation of the report by a commissioner taking an account under the decree, be reviewed and set aside. *Davis v. Roberts*, 543.
31. Where exceptions are allowed to a report reducing the amount of the account reported, the Court can, without referring the account back for a restatement, modify the report, and settle the true amount upon the evidence reported. *Ib.*
32. Pending a bill filed by an administrator, to ascertain to whom notes secured by a mortgage, made by his intestate, should be paid, the estate of the mortgagor was declared insolvent, which fact was made the matter of a supplemental bill by the administrator; held, that the insolvency of the estate did not suspend the action of the Court in granting a decree in the case, or the right of the successful litigant to a sale of the mortgaged premises to pay his debt.
Cannon v. Kinney, et al. 555.

33. Where a bill for an injunction had been filed twelve months, and the answer denying its allegations been filed four months, and by law the complainant was authorized to take testimony in thirty days after the bill was filed, and a motion was made to dissolve the injunction; *held*, that a continuation of the motion will not be granted to enable the plaintiff to procure testimony to sustain his bill. *Freeman v. Finnall, et al.* 624.

PRAAYER.

Where a complainant prays for particular relief, and for other and further relief, he can have no relief inconsistent with the specific relief asked, even though there may be just foundation for it in the bill: in such case, the prayer for other relief must be in the disjunctive.

Martin, Pleasants, & Co. v. Glasscock, et al. 17.

PRINCIPAL AND SURETY.

- G. sold B. & W. negroes, introduced into this State in violation of law; B. & W. executed a note in part payment, which M. indorsed; G. sued B. & W. at law on the note, and they set up the illegality of the consideration of the note, and were discharged. G. at the same time sued the indorser, who, being ignorant of the consideration of the note, made no defence, and judgment was had against him. M. exhibited his bill, setting forth these facts, and praying for a perpetual injunction against the judgment at law; *held*, that M. was entitled to the relief asked, and that the judgment should be perpetually enjoined. *Miller v. Gaskins*, 524.

PRIVATE BANKING.

1. An incorporated association of men for the purposes of banking is but a private partnership, and their contracts and liabilities are those of private partners. *Boisgerard, et al. v. Wall*, 404.
2. Where, by the articles of a partnership association, for the purpose of private banking, each partner was to execute a mortgage to the partnership, to secure the payment of his stock in the partnership, and afterwards the mortgages were made, securing not only the stock, but also the circulation and debts of a general character, of the partnership; *held*, that the mortgages were a security for the debts of the partnership, to which a creditor, to whom the partnership had assigned the mortgages, might resort for payment. *Ib.*

PRIVITY.

1. A vendee of land, held to be privy to the fraud of the vendor:—1. Because he was the brother of the vendor, and lived in the same neighborhood, and sometimes together. 2. Because the vendor, at the time of sale, was embarrassed by debts, and that embarrassment known to the vendee, and the vendor had declared his intention not to pay the debts embarrassing him, which declaration, from their relation, the vendee was presumed to have known. 3. Because the sale was made upon a credit of eleven years, and

INDEX.

- the vendee knew the effect would be to divest the vendor of all his property, and thereby hinder, delay, and defraud creditors in the collection of their debts. *Pope v. Andrews, et al.* 135.
2. It is not necessary to the joinder of different defendants in the same bill, that a privity exist between each two of the defendants, provided a privity exist between each of the defendants separately, and the other defendants upon whom the *gravamen* of the bill rests. *Wright, et al. v. Shelton, et al.* 399.
3. A mere stranger, without interest in the matter in controversy, has no right to question the validity of the title to the property as between the other parties to the suit. *Bingaman v. Hyatt, et al.* 437.

PROBATE COURT.

1. If the probate of a will has been obtained by fraud or surprise, the probate courts of this State have power, upon a proper showing, to vacate the probate thus irregularly obtained, examine the whole matter *de novo*, and decide accordingly. *Hamberlin, et al. v. Terry, executor, et al.* 589.
2. The probate courts of this State have, under our constitution, sole jurisdiction of the subject of wills, a jurisdiction, at least, commensurate with that of the ecclesiastical courts of Great Britain; and the court of chancery has no power, in this State, to decree the probate of a will void, even though charged to have been procured by fraud, such power belonging exclusively to the probate courts. *Ib.*
3. H. and others filed their bill, stating that the will of their ancestor, made in a fit of lunacy, had been probated by fraud, and praying the court of chancery would set the probate aside; the will contained a clause emancipating the slaves which remained in the hands of the executor, and also constituted a residuary legatee, who was not made a party to the bill; *held*, that though the court of chancery had no jurisdiction to set aside the probate of the will, yet that the emancipation of the slaves was a void bequest, and to that extent the court would have jurisdiction, if the residuary legatee had been party to the proceedings. *Ib.*
4. Where the property of an intestate is sold by order of the probate court, the records of that court must show that the statutory prerequisites for the validity of such a sale had been complied with; otherwise such sale would pass no title. *Lowry & Puckett v. McDonald & Rogers*, 620.

PROCESS.

1. The neglect of the complainant to have process served, is just ground for dissolving an injunction in the case. *Payne v. Cowan, et al.* 27.
2. The rule in such case is based upon the ground of negligence; where process has been regularly sued out, but irregularly served, and the complainant proceeds to take out new process, as soon as the irregularity is discovered, the rule will not apply. *Ib.*

PRO CONFESSO.

1. A mere motion in Court to dissolve an injunction granted in a case, is not that formal entry of appearance, which will authorize the complainant to take a *pro confesso* against the party making the motion.
Cheoning, et al. v. Nichols, et al. 122.
2. To justify the complainant's taking his bill for confessed, process must either have been served upon the other party, or his appearance, as a defendant to the cause, formally entered of record. *Ib.*
3. A bill may be taken for confessed, even though the exhibits to the bill are not filed. *Gwin v. Stone*, 124.
4. Applications to set aside *pro confessos* are addressed to the discretion of the Court, upon the circumstances of each particular case, and will, as a general rule, be granted, if not productive of injurious delay, and the applicant has not been culpably negligent. *Gwin v. Harris*, 528.
5. G. filed his bill against H., a nonresident, and, upon proof of publication of notice, took his bill confessed: H. applied for leave to answer, stating that he knew of the pending of the bill, but his counsel informed him no answer would be needed; as soon as he heard a *pro confesso* had been entered against him, he came to the State to have it set aside; the cause was not in a state for final hearing, for want of further evidence on the part of the complainant; held, that the *pro confesso* should be set aside, and the answer filed, upon the payment of all costs by the defendant. *Ib.*

PURCHASER WITHOUT NOTICE.

1. Taking property in payment of a preexisting debt does not make the buyer a purchaser for valuable consideration, in the eye of the law, as against one holding a prior equity. *Harris v. Adams, et al.* 45.
2. In a bill filed to foreclose a mortgage upon property, which has passed by sale, from the mortgagor into the possession of third persons, it is not necessary to allege in the bill, that the persons in possession had notice of the mortgage. *Stacy, administrator, &c. v. Barker, et al.* 112.
3. That a party is a *bona fide* purchaser without notice, is purely a matter of defence, and must be set up by the party who would avail himself of it, whether notice be charged or not. *Ib.*
4. Where a bill is filed to enforce a mortgage on property in the hands of persons in possession of the property by title derived from the mortgagor, the allegation that they hold by "a pretended purchase," is equivalent to a charge of notice of the mortgage. *Ib.*
5. A vendee, who would protect himself against a prior equity, upon the ground of being a *bona fide* purchaser without notice, must deny notice, fully, positively, and precisely, even though it be not charged on the other side. *Jenkins v. Bodley, et al.* 338.
6. Where a party designs protecting himself under the defence of being a *bona fide* purchaser, for a valuable consideration, without notice, it is a defence

INDEX.

which he must set up for himself, and it is not necessary for the other party to charge him with notice. *Herring v. Winans, et al.* 406.

Q.

QUITCLAIM.

Where a vendee takes from his vendor such title only as the vendor had, he cannot afterwards, for mere defect in title, obtain a rescission of the contract. *Pintard v. Martin, et al.* 126.

R.

REAL ESTATE.

Where the testator, in his will, gave the executor a discretion to sell a portion of his realty, but did not direct an absolute sale; *held*, that the realty was not thereby converted into personalty, and that a pecuniary legacy was not chargeable thereon, unless so expressly provided by the testator.

Montgomery, et ux, v. Milliken, et ux, et al. 495.

REDEMPTION.

1. The only relief a court of equity can grant a mortgagor upon his mortgage, is to allow him to redeem his mortgaged property, upon a bill properly shaped for that purpose. *Craft v. Bullard*, 366.
2. C. filed his bill against B., alleging, that B. had obtained a judgment at law upon a note, to secure the payment of which he had conveyed B. two negroes; averring, that B. had been in possession of one ever since the sale, and prays for an account of his hire and of his value, and for an injunction against the judgment at law; *held*, that upon such a bill, the injunction could not be obtained. *Ib.*
3. A mortgagor has no right to force the mortgagee to take the property at an assessed value, and cannot call for an account upon any such principle. *Ib.*

REGISTRATION.

1. A judgment in this State, of older date than the registration of a mortgage though junior to its execution, will be a prior lien upon the land embraced in the mortgage. *Bingaman v. Hyatt, et al.* 437.
2. The refusal of the agent of the United States, residing with the Indians, to register the application of the Indians, claiming under the 14th article of the Dancing Rabbit Creek treaty, does not affect the validity of the claim and application of such Indians. *Heirs of C. Land v. Heirs of T. Land*, 158.
3. The right of the head of a Choctaw family to a reservation under the 14th article of the Dancing Rabbit Creek treaty, vested whenever such Choctaw signified his intention to the agent of the United States, of becoming a citizen of the State, and that right becomes complete, whenever a residence on

the land for five years subsequent to the ratification of the treaty was accomplished. *Ib.*

REHEARING.

A rehearing will be granted, as a general rule, when the party applying has complied strictly with the rule of the Court, in procuring the certificate of two respectable counsel in support of it, but not otherwise.

Colton v. Parker, administratrix, 191.

RELEASE.

1. To discharge one party to a contract, on the ground of the failure of the other to perform his part, such failure must be clearly established by full, direct, and satisfactory evidence. *Wright, et al. v. Petrie, et al.* 282.
2. P. contracted to build a railroad for the Brandon Bank, at a stipulated price; and, receiving money from the bank for that purpose, executed a mortgage to secure its proper application. P. abandoned the work before its completion, and while the bank was in advance of money to P.; the bank, being in embarrassed and failing circumstances, without valid consideration, voluntarily released the mortgage, and discharged P. from the debt; *held*, that the release of the mortgage, and the discharge of the debt, were fraudulent and void, as to the judgment creditors of the bank. *Ib.*

RELIEF.

1. Where a complainant prays for particular relief and for other and further relief, he can have no relief inconsistent with the specific relief asked, even though there may be just foundation for it in the bill; in such case the prayer for other relief must be in the disjunctive.
Martin, Pleasants, & Co. v. Glasscock, et al. 17.
2. A. having made a payment upon a note, which is credited upon the back of it, being sued at law upon the note, permits judgment to be rendered against him for the whole amount of the note, without pleading payment, or calling the attention of court and jury to the credit on the back of the note, is not entitled to relief in a court of equity.
Commissioners of the Sinking Fund v. Patrick, et al. 110.
3. A party having a valid legal defence, which by gross negligence he failed to make at law, cannot be heard to make it in a court of equity. *Ib.*
4. The only relief a court of equity can grant a mortgagor upon his mortgage, is to allow him to redeem his mortgaged property, upon a bill properly shaped for that purpose. *Craft v. Bullard*, 366.
5. C. filed his bill against B., alleging that B. had obtained a judgment at law upon a note, to secure the payment of which, he had conveyed B. two negroes, averring that B. had been in possession of one ever since the sale, and prays for an account of his hire and of his value, and for an injunction against the judgment at law; *held*, that upon such a bill the injunction could not be obtained. *Ib.*

INDEX.

6. A mortgagor has no right to force the mortgagee to take the property at an assessed value, and cannot call for an account upon any such principle. *Ib.*

RESCISSON.

1. Where the vendee takes from his vendor such title only as the vendor had, he cannot afterwards, for mere defect in title, obtain a rescission of the contract. *Pintard v. Martin, et al.* 126.
2. Where a vendee comes to the knowledge of a fraud practised upon him in the sale of property, and afterwards continues for a series of years in the use, enjoyment, and occupation thereof, without taking any active measures for redress, or making known any dissatisfaction, until a change of times may have depreciated its value, he can have no relief in equity. *Ib.*
3. Where a party having knowledge that he has been defrauded, proceeds to do acts in confirmation of his contract, by voluntarily entering into a new engagement concerning it, he will be held thereby to have waived the fraud, and to have renounced that relief which he might otherwise have had in equity. *Ib.*
4. A rescission of a contract, on account of alleged defect in title, will not be granted, when at the hearing of the case it is apparent a perfect title may be had, and no fraud is alleged or proved.

Fletcher v. Wilson, et al. 376.

5. As a general rule, a court of equity will not rescind a contract for mere defect of title, where the vendor has been guilty of no fraud, mistake, or misrepresentations, unless, at the time of the decree, it appears, that the vendor is totally unable to make title, and there is no adequate remedy at law. *Ib.*
6. A vendee, discovering a defect in his title, should, at once, if he designs doing so at all, surrender the possession of the property, and demand a rescission, and his neglect to do so is a waiver of his right to a rescission. *Ib.*
7. Where covenants are mutual and dependent, and have been violated by one party thereto, and the other desires to absolve himself therefrom, he must offer to comply fully with his part of the contract, before he can do so.

Hines v. Baine, et al. 530.

RETURN.

1. The return of satisfaction upon an execution, though false, so far extinguishes the lien of the judgment upon which the execution issued, that property of the defendant in the execution, sold subsequent to the return, would no longer be subject to it. *Parks v. Person,* 76.
2. *Alier*, if the false return is made after sale of property of the defendant; in such case, on the return being vacated, the lien would still exist on the property previously sold. *Ib.*
3. It is wholly irregular to set aside a return of satisfaction upon an execution,

in a court of law, without notice, at least, to the defendant in the execution, such a proceeding is absolutely void. *Ib.*

4. Whether, where the vacating a false return upon an execution will affect the rights of subsequent purchasers from the defendant in the execution, these subsequent purchasers are entitled to notice of the proceedings. *Quare. Ib.*

S.

SATISFACTION.

1. A levy upon personal property, sufficient to satisfy the judgment, is, while the levy subsists, a satisfaction of the judgment; a sale of other property than that embraced in the levy, by another execution in the same judgment, while the first levy remains undisposed of, passes no title.
Bingaman v. Hyatt, et al. 437.
2. An irregular forthcoming bond, incapable of forfeiture, being taken, does not discharge the levy of the execution, and, upon the quashing such a bond, the original judgment remains in full force. *Ib.*
3. Upon an execution issuing upon a judgment, a levy was made, and an illegal forthcoming bond was given, which was afterwards quashed, another execution issued upon the original judgment, and property was sold under it; *held*, that the purchaser acquired no title; the judgment being in law satisfied by the first levy. *Ib.*
4. *Quare.* Where a sheriff levies upon and sells more land than is necessary to satisfy the execution, where the land is capable of division, is such a sale void? *Ib.*

SCHEDULE.

1. Where, in a deed of assignment of its property, a bank conveyed in general words, all its effects; *held*, that the omission to annex a schedule of the property assigned, is no objection to the validity of the assignment.
Robins, et al. v. Embry, et al. 207.
2. In a deed of assignment by a bank, a covenant on the part of the assignees to exhibit, periodically, a statement of their accounts to the board of directors, is no objection to the validity of the assignment. *Ib.*
3. Where a deed of assignment by an incorporation, of its effects for the payment of its debts, is void in part, it is void *in toto*. *Ib.*
4. A provision in a deed of assignment by a bank, requiring the assignees "to pay all the necessary expenses of the president, directors, and company of the bank, in the management of the corporation"; *held*, not to be such a reservation for the benefit of the grantor, as will make the assignment void upon its face, the fund assigned for the payment of the debts being not only of a limited and definite amount, but also of an indefinite assignment of annually accruing profits; and the reservation not appearing to be for any fraudulent purpose. *Ib.*

INDEX.

SECRET TRUSTS.

1. An agreement between two parties, that one shall hold in his name the property of the other, and shall pay with it the debts of the latter, and use it as he may direct, is such an agreement as a court of equity will enforce as between the parties; and it can only be assailed at the instance of creditors who are thereby defrauded. *Everett v. Winn, et al.* 67.
2. E. files his bill, stating, that he held of W. in secret trust for the benefit of W., and to secure advances of himself for W.'s account; that W. was in arrears for money thus advanced, in a large sum, and had fraudulently procured G. to become the purchaser with W.'s money, at a tax sale of the property so held by E., and seeking to subject the property in the hands of G. to the advance so made; *held*, that a court of equity would have jurisdiction of the case; upon the answer, however, of G., denying the fraud, and it not being established by proof, the jurisdiction would cease. *Ib.*

SEPARATE ESTATE.

- S. by deed of gift, conveyed to F. certain negroes, in these words, "in trust for the use and benefit of my daughter Ann and her lawful heirs," "in trust for the proper use and benefit of the said Ann and her heirs forever"; *held*, that these words conveyed to the daughter an estate for her sole and separate use, and that, during her life, it was not subject to the debts of the husband. *Warren v. Haley, et al.* 647.

SHERIFF.

1. The return of satisfaction upon an execution, though false, so far extinguishes the lien of the judgment upon which the execution issued, that property of the defendant in the execution, sold subsequent to the return, would no longer be subject to it. *Parks v. Person, et al.* 76.
2. *Alier*, if the false return is made after sale of property of the defendant; in such case, on the return being vacated, the lien would still exist on the property previously sold. *Ib.*
3. It is wholly irregular to set aside a return of satisfaction upon an execution, in a court of law, without notice, at least, to the defendant in the execution; such a proceeding is absolutely void. *Ib.*
4. Whether, where the vacating a false return upon an execution will affect the rights of subsequent purchasers from the defendant in the execution, these subsequent purchasers are entitled to notice of the proceedings. *Quære. Ib.*
5. *Quære*. Where a sheriff levies upon and sells more land than is necessary to satisfy the execution, where the land is capable of division, is such a sale void? *Bingaman v. Hyatt, et al.* 437.
6. A sheriff's return, that he took a forthcoming bond, which was forfeited, is not conclusive evidence of the fact, but may be impeached collaterally in a proceeding to which the sheriff is not a party. *Patterson v. Denton*, 592.

SLAVES.

1. R. & H. introduced negroes into this State since the first of May, 1833, as merchandise, and for sale, and sold them to R., and took in payment for them the notes of A. payable to H. G. R., and by H. G. R. indorsed, secured by mortgage on a tract of land; *held*, upon this state of fact, that R. & H. were entitled to foreclose the mortgage given by A. and assigned in payment of the illegal consideration by H. G. R. to R. & H.
Rowan & Harris v. Adams, et al. 45.
2. A vendee, having purchased negroes introduced into this State in violation of the constitution, cannot, in a court of equity, escape the payment of the purchase-money, without offering to surrender back the slaves, and account for their hire. *Ib.*
3. Where the bill charged upon the defendant the introduction of negroes into this State for sale, which was positively denied by the answer taken; *held*, that proof of mere admissions of the party defendant, that he had so introduced the negroes, would not alone be sufficient to overthrow the positive denial of the answer and the corroborative proof. *Hope v. Evans, et al.* 195.
4. Where a party has knowingly entered into an illegal contract, and has voluntarily made payments therein, he has no claim, either in law or equity, to recover back the money so paid. *Ib.*
5. E. sold H. a tract of land and negroes, some of the latter of which had been brought into this State in violation of law, for sale; H. made partial payment, and filed his bill to rescind the contract of sale, which, he averred, was an entire one, on account of illegality; *held*, that H. was entitled to no relief; that the Court would not decree a repayment of the money already paid, and could not decree a partial rescission of the contract. *Ib.*
6. G. G. bought slaves of N., which were introduced into this State and sold in violation of law; and to secure the purchase-money executed a deed of trust on land, and afterwards sold the land to C. G., which was again sold under the deed of trust to N., at which sale also C. G. became the purchaser, executed his notes to N. for the purchase-money, and gave a deed of trust to secure their payment; N. attempted to sell under the deed of trust, and was enjoined by C. G., on the ground that this debt to N. was the assumption by him of the debt of G. G.; *held*, that the illegality of the consideration of the notes of G. G. did not attach to the notes by C. G., and that N. was entitled to sell under the deed of trust.
Gibson's heirs v. Niblett, et al. 278.
7. A mortgagee, who sells a portion of the mortgaged property, must account for the value of the property sold, and, if slaves, for their hire.
Craft v. Bullard, 366.
8. H. and others filed their bill, stating, that the will of their ancestor, made in a fit of lunacy, had been probated by fraud, and praying the Court of Chancery would set the probate aside: the will contained a clause emancipating the slaves which remained in the hands of the executor, and also constituted a residuary legatee, who was not made a party to the bill; *held*, that, though

INDEX.

the Court of Chancery had no jurisdiction to set aside the probate of the will, yet, that the emancipation of the slaves was a void bequest, and to that extent the Court would have jurisdiction, if the residuary legatee had been a party to the proceedings. *Hamberlin, et al. v. Terry, et al.* 589.

SPECIFIC PERFORMANCE.

1. F. and J. entered into partnership, to transact the mercantile business; F. sold to J., and J. gave F. a bond of indemnity, with surety, conditioned to pay all the debts of the firm; J. died insolvent, without leaving any legal representative, and leaving the debts unpaid; F. filed a bill against the sureties in the indemnity bond, to compel them to a specific performance of their contract; *held*, on demurrer to the bill, that the Court could not grant the relief asked, and decree a specific performance of such a contract.

Foote, et al. v. Garland, et al. 95.

2. S. contracted with P. and others to do a piece of work, for a certain agreed price, and receive his pay in the notes of a certain bank, or their equivalent, the price agreed to be paid being but a fair compensation for the labor to be done; before the work was completed, the notes of the bank agreed upon depreciated to be worth but one tenth part of their value at the time of the contract; S. filed his bill to enforce the payment, in good money, of the debt due to him, which P. and others resisted, and claimed the right to pay in the notes agreed on; *held*, that the great depreciation of the notes was a circumstance not looked to, or provided for, by either party, and that it would be inequitable to force S. to receive them, and that he was entitled to recover a fair price for the work done, in current money.

Sample v. Pickens, et al. 501.

3. H. bought land of P. and L., and gave his notes for the purchase-money, and took their bond for title; H. did not pay the notes when due, and P. and L. sold the land to B. and M., who had knowledge of the title sale to H.; H. filed his bill, offering to pay the notes, and demanding title; *held*, that H. was entitled to the land, upon the payment of the notes, and that B. and M. held the legal title, for the benefit of H. *Hines v. Baine, et al.* 530.

STATUTE OF LIMITATIONS.

A statute of limitations of possessory actions embraces an application for dower. *Torrey v. Minor, et al.* 489.

SUBMISSION.

1. Where a cause is submitted for final hearing, and some point in the case is left unproved, or is not sufficiently explained, it is in the power and discretion of the chancellor to remand the case to the docket, and direct it to stand over for further proof. *Planters Bank of Mississippi v. Courtney*, 40.
2. A cause cannot be submitted, against the consent of the complainant, for

final hearing, at the same term of the Court at which the answers are filed; the complainant is entitled to the succeeding term to take testimony.

Everett v. Winn, et al. 67.

SURETY.

R., being surety to A. R. for T., was indemnified by a mortgage on T.'s property, and filed his bill to foreclose the mortgage, and be discharged from his suretyship; *held*, it was no answer to this bill, that T. had been garnisheed at law, as a debtor of A. R., and that the garnishment was still pending. *Robinson v. Thompson, et al.* 454.

T.

TAX SALE.

1. Where a tender was made for the purpose of redeeming property sold at tax sale, and after the tender had been made, the person desiring to redeem also requested the purchaser to deliver possession of the property, and cancel the tax deeds; *held*, that the requests formed no part of the tender, and were not limitations upon it. *Bacon, et al. v. Conn.* 348.
2. A court of chancery has jurisdiction to decree a cancellation of a tax collector's deed, in a proper case. *Ib.*

TENDER.

1. To constitute a valid tender, it must be unconditional, and of a definite and specific character. *Bacon, et al. v. Conn.* 348.
2. Where a tender was made for the purpose of redeeming property sold at tax sale, and after the tender had been made, the person desiring to redeem also requested the purchaser to deliver possession of the property, and cancel the tax-deeds; *held*, that the requests formed no part of the tender, and were not limitations upon it. *Ib.*
3. If a person makes a tender, coupled with a condition, and the tender is positively rejected, without assigning any reason or objection to it, how far the person refusing the tender can afterwards make objections to the form and mode of it. *Quære. Ib.*

TESTIMONY.

A cause cannot be submitted, against the consent of the complainant, for final hearing, at the same term of the Court at which the answers are filed; the complainant is entitled to the succeeding term, to take testimony.

Everett v. Winn, et al. 67.

TIME.

Time is never important in equity, unless made so by the very terms of the contract, or is necessarily so, from the very nature of the property about which the contract is made. *Fletcher v. Wilson, et al.* 376.

TITLE.

1. A rescission of a contract, on account of alleged defect of title, will not be granted, where at the hearing of the case it is apparent a perfect title may be had, and no fraud is alleged or proved.

Fletcher v. Wilson, et al. 376.

2. A person selling property under a defective claim, afterwards by purchase or descent acquired a perfect title; *held*, that that title will enure to the benefit of the vendee. *Ib.*
3. As a general rule, a court of equity will not rescind a contract for mere defect of title, where the vendor has been guilty of no fraud, mistake, or misrepresentation, unless, at the time of the decree, it appears that the vendor is totally unable to make title, and there is no adequate remedy at law. *Ib.*
4. A mere stranger, without interest in the matters in controversy, has no right to question the validity of the title to the property, as between the other parties to the suit. *Bingaman v. Hyatt, et al.* 437.
5. The rule, that a party must recover upon the strength of his own title, and not upon the weakness of his adversary's, holds equally in equity as at law.

Pickens v. Harper, et al. 538.

6. In a sale by a person who acts as the mere agent of the law, or ministerial officer, there is, as a general rule, no implied warranty of the quality or property of the thing sold; yet this rule does not apply, when such agent or officer assumes an authority when none is given by law, in such case equity will grant relief. *Lowry & Puckett v. McDonald & Rogers*, 620.
7. Where a person is seeking relief in equity against his grantor in a deed, on account of a failure in title to the property conveyed by the deed, a general charge of defect of title, without stating in what particular the defect consists, is not a sufficient charge to entitle him to any relief therefor.

Latham v. Morgan & Fitz, 611.

8. Where the grantee in a deed, is let into possession under his deed, and no eviction, actual or threatened, is charged, the allegation of the insolvency of the grantor will not be sufficient to entitle the party to relief against a defect of title to the property. *Ib.*
9. The words "grant, bargain, and sell" in a deed, under the statute of this State, do not amount to a general warranty, or a covenant of seisin; but merely, that the grantor has not done any act, nor created any incumbrance, whereby the estate might be defeated. *Ib.*

TREATY.

1. The refusal of the agent of the United States, residing with the Indians, to register the application of the Indians, claiming under the 14th article of the Dancing Rabbit Creek treaty, does not affect the validity of the claims and application of such Indians.

Heirs of C. Land v. Heirs of T. Land, 152.

2. The right of the head of a Choctaw family to a reservation, under the 14th article of the Dancing Rabbit Creek treaty, vested whenever such Choctaw signified his intention to the agent of the United States, of becoming a citizen of the State, and that right became complete whenever a residence on the land for five years, subsequent to the ratification of the treaty, was accomplished. *Ib.*
3. Under the 14th article of the Dancing Rabbit Creek treaty, granting reservations of land to the head of each Choctaw family, and to each of his children, the treaty intended to secure to the head of the family only one section, and to each of the children, the amount stipulated by the treaty; *held*, therefore, that the bill of a Choctaw Indian, setting up title in himself to the portion of land reserved to his children, must be dismissed.

Pickens v. Harper, et al., 539.

TRUST ESTATE.

1. It is not necessary to make the personal representative of a deceased party a defendant to a bill filed by creditors, seeking to subject a fund specifically pledged by the decedent for the payment of their debt; no claim being made upon the general assets of the estate.

Martin, Pleasants, & Co. v. Glasscock, et al. 17.

2. A person, for whose benefit a trust is created without his knowledge, may afterwards affirm it, and enforce its execution. *Ib.*
3. W. (in debt) and H. (possessed of large property) being about to marry, by deed of settlement before the marriage, convey to a trustee, for H.'s sole and separate use, all her property on trust. 1. For the use of W. and H. for their natural lives, subject to disposal by H. by will. 2. That H. should have, during her life, full control over the property, and that it should not be subject to W.'s debts, or his control. 3. That the trustee might sell when requested; *held*, that W., on the death of H., had no right in the property thus conveyed, or to a participation in the proceeds, income, or profits of it.

Williams v. Claiborne, et al. 355.

4. W., about to marry H., declared by deed his intention to secure to H. the separate use and disposal of the property conveyed by the deed, and also the income and profits of it; *held*, that W. is estopped, by the recitals of the deed, to set up a claim either to the property or the profits thereof. *Ib.*
5. To enforce a specific trust upon real estate from loose and equivocal expressions made by one of the parties in mere social conversations, held at different times, would be inequitable, and contrary to the spirit and policy of the statute of frauds. *Mercer, administrator, etc. v. Stark*, 479.
6. The existence of an express trust necessarily excludes the idea of an implied trust in relation to the same thing. *Ib.*
7. J. H. executed a note, with W. H. as his surety, to L. M. & Co., and to indemnify W. H., J. H. conveyed property in trust to T.; L. M. & Co. transferred the note to D., who, J. H. becoming insolvent, filed a bill to subject

INDEX.

the property conveyed in trust to T., to the satisfaction of his debt; *held*, that the trust property was liable in equity to the payment of the note in the hands of the assignee. *Dick, et al. v. Truly, et al.* 557.

TRUSTEE.

1. A trustee to sell property, who has advertised it for sale, being the mere agent of the *cestui que trust*, and without interest in the controversy, is a proper party to a bill filed to enjoin the sale of the property embraced in the trust, on the ground of a fraudulent combination on the part of the *cestui que trust*, and another person, to defraud the complainant of his right in the trust property. *Everett v. Winn, et al.* 67.
2. A party who receives from his debtor the note of a third person, as collateral security for his own debt, is bound to use due diligence in collecting it, and if it is lost by any delay of his, he becomes responsible for the amount. *Steger, administrator, v. Bush, et al.* 172.
3. A mere delay to prosecute the collection, unaccompanied by consequent loss, will not render the creditor responsible. *Ib.*
4. Where a creditor, having sued upon collateral paper, granted a stay of execution for six months upon the judgment; *held*, that the stay is not such delay, unless the stay is the occasion of the loss of the debt, as will render the creditor responsible for the amount of the collateral paper. *Ib.*
5. Banking corporations are trustees, not only for the stockholders, but also for the creditors, who have a prior and paramount equity. *Robins, et al. v. Embry, et al.* 207.
6. The creditors of a corporate body can enforce their claims against any of the property of the incorporation, in the hands of persons affected with a knowledge of its corporate character. *Ib.*
7. A corporation is trustee for the creditors; and where a transfer of its property is made without valid consideration, they may pursue the property, and force the assignee thereof to account for it. *Wright, et al. v. Petrie, et al.* 282.

V.

VENDOR AND VENDEE.

1. Where a vendee takes from his vendor such title only as the vendor had, he cannot afterwards, for mere defect in title, obtain a rescission of contract. *Pintard v. Martin, et al.* 126.
2. Where a vendee comes to the knowledge of a fraud practised upon him in the sale of property, and afterwards continues for a series of years in the use, enjoyment, and occupation thereof, without taking any active measures for redress, or making known any dissatisfaction, until a change of times may have depreciated its value, he can have no relief in equity. *Ib.*

3. A sale by one greatly in debt, and whose every means were more than demanded to meet his immediate and pressing wants, of his property, on a credit of nine, ten, and eleven years, is made "with intention to hinder, delay, and defraud creditors." *Pope v. Andrews, et al.* 135.
4. If a vendor make a fraudulent sale of his property, to avoid the payment of his debts, to a vendee ignorant of the fraud of the vendor, the vendee will be protected as a purchaser for valuable consideration. *Ib.*
5. A vendee of land, held to be privy to the fraud of the vendor. 1. Because he was the brother of the vendor, and lived in the same neighborhood, and sometimes together. 2. Because the vendor, at the time of sale, was embarrassed by debts, and that embarrassment known to the vendee, and the vendor had declared his intention not to pay the debts embarrassing him, which declaration, from their relation, the vendee was presumed to have known. 3. Because the sale was made upon a credit of eleven years, and the vendee knew the effect would be to divest the vendor of all his property, and thereby hinder, delay, and defraud creditors in the collection of their debts. *Ib.*
6. Want of notice protects a purchaser against a latent equity only, not against the legal title; in the latter case, the maxim, *caveat emptor*, applies. *Jenkins v. Bodley, et al.* 338.
7. A vendee who would protect himself against a prior equity, upon the ground of being a *bona fide* purchaser, without notice, must deny notice, fully, positively, and precisely, even though it be not charged on the other side. *Ib.*
8. A person, selling property under a defective claim, afterwards, by purchase or descent, acquired a perfect title; *held*, that that title will enure to the benefit of the vendee. *Fletcher v. Wilson, et al.* 376.
9. As a general rule, a court of equity will not rescind a contract for mere defect of title, where the vendor has been guilty of no fraud, mistake, or misrepresentation, unless, at the time of the decree, it appears, that the vendor is totally unable to make title, and there is no adequate remedy at law. *Ib.*
10. A vendee, discovering a defect in his title, should at once, if he designs doing so at all, surrender the possession of the property, and demand a rescission, and his neglect to do so is a waiver of right to a rescission. *Ib.*
11. It is essential to the validity of an administrator's sale, that the probate record disclose a substantial compliance with the requirements of the statute on that subject. *Crisman, et al. v. Beasley, administrator*, 561.
12. Where a person is seeking relief in equity, against his grantor, in a deed, on account of failure in title to the property conveyed by the deed, a general charge of defect of title, without stating in what particular that defect consists, is not a sufficient charge to entitle him to any relief therefor. *Latham v. Morgan & Fitz*, 611.

W.

WARRANTY.

1. A covenant of general warranty, binding the grantor and his heirs in a deed of bargain and sale of real estate, is a real covenant, running with the land, and enures to the benefit of all subsequent purchasers.

Torrey v. Minor, et al. 489.

2. S. G. sold, by deed of warranty, binding himself and heirs, a tract of land to W., who intermarried with A. G., one of the heirs of S. G.; W. alienated the land, and died; his widow applied for dower in the land so sold to her husband; *held*, that she was not entitled to dower therein. *Ib.*
3. In a sale by a person who acts as the mere agent of the law, or as a ministerial officer, there is, as a general thing, no implied warranty of the quality or property of the thing sold; yet this rule does not apply, when such agent or officer assumes an authority where none is given by law; in such case, equity will grant relief. *Lowry & Puckett v. McDonald & Rogers*, 620.
4. The words, "grant, bargain, and sell," in a deed, do not, under the statute of this State, amount to a general warranty, or covenant of seisin; but merely that the grantor has not done any act, nor created any incumbrance, whereby the estate might be defeated. *Latham v. Morgan & Fitz*, 611.

WILL.

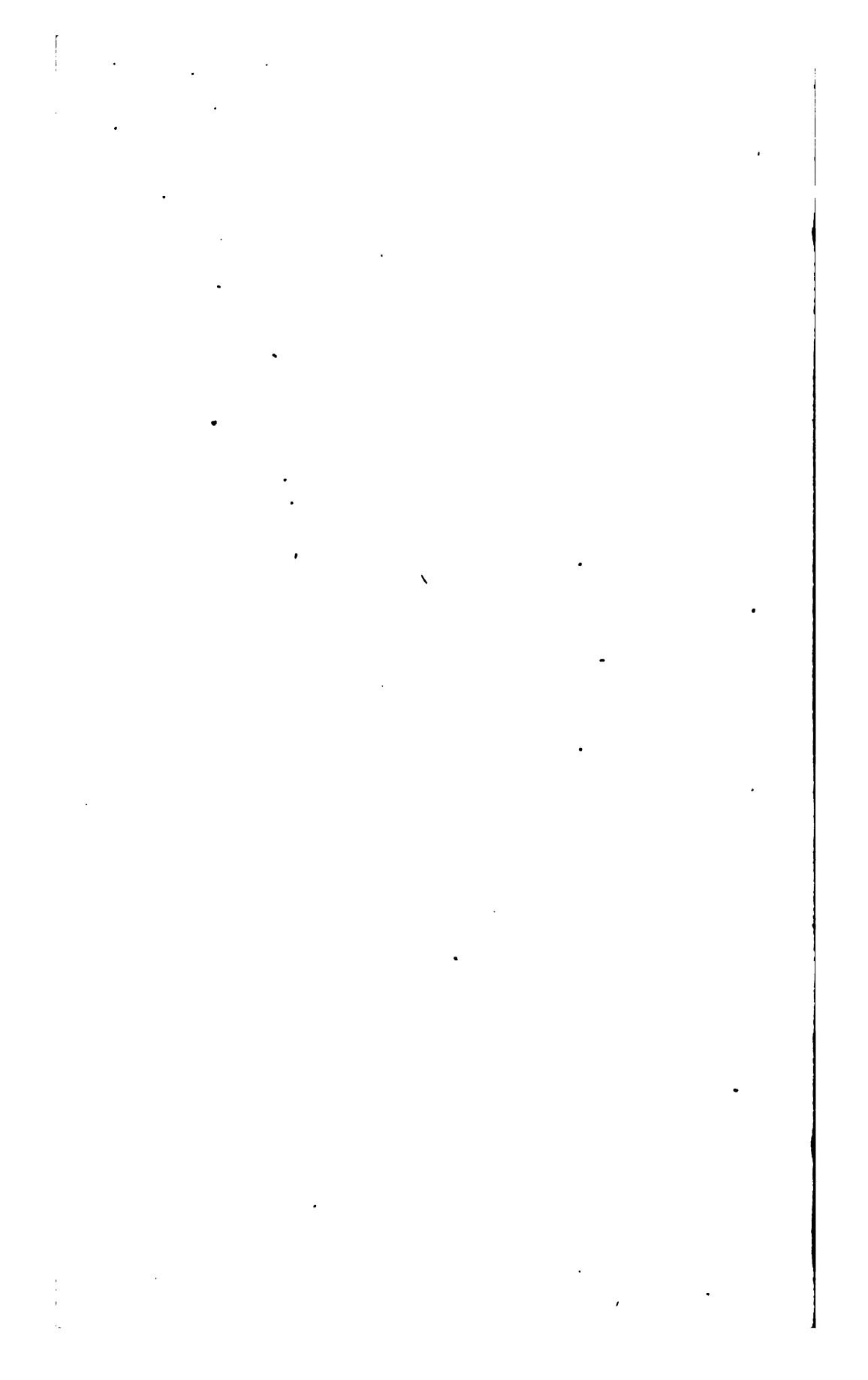
1. Where a will, made in another State, is probated there, and the testator has property in this State, and a copy of the probated will is admitted to probate in this State, according to the statute (How. and Hutch. 388), in a suit for a legacy under the will, brought in the courts of this State, a certified copy of the probate copy of the will, from the probate court in this State, will be admissible evidence. *Montgomery, et uxoris, v. Milliken, et uxoris, et al.* 495.
2. If the probate of a will has been obtained by fraud or surprise, the probate courts of this State have power, upon a proper showing, to vacate the probate thus irregularly obtained, examine the whole matter *de novo*, and decide accordingly. *Hamberlin, et al. v. Terry, executor, et al.* 589.
3. The probate courts in this State have, under our constitution, sole jurisdiction of wills, a jurisdiction at least commensurate with that of the ecclesiastical courts of Great Britain; and the court of chancery has no power, in this State, to decree the probate of a will void, even though charged to have been procured by fraud, such power belonging exclusively to the probate courts. *Ib.*
4. H. and others filed their bill, stating that the will of their ancestor, made in a fit of lunacy, had been probated by fraud, and praying that the court of chancery would set the probate aside; the will contained a clause emancipating the slaves which remained in the hands of the executor, and also constituted a residuary legatee, who was not made a party to the bill; *held*, that though the court of chancery had no jurisdiction to set aside the probate of the will, yet that the emancipation of the slaves was a void bequest, and

to that extent the court would have jurisdiction, if the residuary legatee had been party to the proceedings. *Ib.*

5. All personal property of a testator not disposed of, that by lapse, or void bequest for illegality, does not pass as directed by the testator, goes to the residuary legatee. A different rule prevails as to real estate. *Ib.*

WITNESS.

1. It is a sufficient ground to suppress a deposition, that the witness testifying is a defendant to the original bill, and no order of court had been given authorizing his depositions to be taken. *Payne v. Cowan, et al.* 27.
2. If the objection relates to the competency of the witness, it can only be made at the final hearing. *Gordon v. Watkins, et al.* 37.
3. An administrator, who is also the son of his intestate, is not a competent witness to prove that his intestate did not execute a note, upon which it was attempted to render him liable. *M'Intyre v. Ledyard, Hatter, & Co.* 91.
4. An administrator, who revives a suit of a deceased complainant, is not a competent witness, on behalf of his intestate, because he is liable for costs. *Ib.*
5. A defendant charged with colluding with his codefendant, in regard to the transaction sought to be impeached, cannot be a witness for his codefendant, especially, where he is liable for costs. *Pope v. Andrews, et al.* 135.
6. A vendor of land, who has taken a deed of trust to secure to himself the purchase-money, is not a competent witness for the vendee, when the sale is attacked as fraudulent, to prove its fairness or testify in relation to it, he being directly interested in upholding the sale, in order to enforce the payment of the notes secured by the deed of trust. *Ib.*



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